No. 2814

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

EASTERN OREGON LAND COMPANY
a Corporation
APPELLANT

vs.

DES CHUTES RAILROAD COMPANY
a Corporation
APPELLEE

DES CHUTES RAILROAD COMPANY
a Corporation
CROSS-APPELLANT

vs.

EASTERN OREGON LAND COMPANY
a Corporation
CROSS-APPELLEE

Brief of Appellee and Cross-Appellant Des Chutes Railroad Company

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EASTERN OREGON LAND COMPANY,
a corporation,
Appellant,

v.

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Appellee.

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Cross-Appellant,

v.

EASTERN OREGON LAND COMPANY,
a corporation,
Cross-Appellee.

Brief of Appellee and Cross-Appellant Des Chutes Railroad Company

STATEMENT

This suit was originally commenced in April, 1910, by the Eastern Oregon Land Company, which we shall hereinafter designate as the Land Com-

pany, against the Des Chutes Railroad Company, which we shall hereinafter designate as the Railroad Company, to enjoin the Railroad Company from constructing its line of railroad over and across certain described lands along the Des Chutes River in Oregon, which the Land Company claimed to own. (Trans. 639.)

The cause of action, as stated in the amended complaint on which the case was tried, was entirely different from that stated in the original complaint. The gist of the original complaint was that the canyon of the Des Chutes River was especially adapted to the development of water power for the manufacture of electricity, and that the line of the Railroad Company was being constructed over the lands of the Land Company without any permission or authority whatever, and as so constructed would absolutely prevent the Land Company from building a dam in the Des Chutes River on its lands to a height *exceeding* sixty feet, and thereby the power which the Land Company would be able to generate would be greatly impaired and the cost of power greatly enhanced and the construction of the proposed power plant obstructed and imperiled.

We particularly ask the Court to note that the entire complaint of the Land Company as originally stated was on account of its inability to construct a dam exceeding sixty feet in height. It inferentially admitted that it could construct a dam to a height of sixty feet.

The gist of the second amended complaint is that

the Railroad Company had, prior to the entering upon the lands, entered into negotiations with the predecessors in interest of the Land Company for the right to enter upon said lands and construct its road, and had agreed with said predecessors in interest that it would construct its line at such height as to permit the erection of a dam on the lands in question, at the dam site, sixty feet in height from mean low water, and that no agreement or consent had ever been secured from the Land Company; that the Railroad Company had entered upon said land under said agreement and represented that its line was being constructed at such height and that prior to the purchase of said lands by the Land Company, it was informed of such representations and agreement with its predecessors in interest, and relying upon said representations and agreement, had purchased said lands and spent in excess of $50,000 therefor, and that the Railroad Company is estopped from denying that its line should be constructed at a height sufficient to permit a dam of sixty feet; that said line was not constructed to such height and that a dam of sixty feet would flood the line of the Railroad Company as constructed; that the line as constructed would greatly interfere with the construction of the dam and curtail the power that could be developed, and the Land Company would be damaged thereby. The prayer was for an injunction enjoining the Railroad Company from entering upon said lands claimed by the appellant and from constructing, building, maintaining and

operating its road over the same, or interfering with the possession or enjoyment of said lands in any way.

The answer of the Railroad Company admitted the ownership of part of the lands claimed to be owned by the Land Company and denied the ownership of others, setting up that part of the said lands claimed to be owned by the Land Company were, at the time of the entry of the Railroad Company thereon, unappropriated public lands of the United States and had been withdrawn from sale or entry by the United States for the purpose of irrigation works under the Act of Congress of June 17, 1902, and that the Railroad Company had acquired a right of way 200 feet in width over said lands by virtue of the approval of its right-of-way maps. As to other of said lands, the Railroad Company set up that same were owned by the Interior Development Company at the time of the entry thereon by the Railroad Company, which company had agreed and consented to the entry thereon and the construction thereover of the line of the Railroad Company at the location at which the line was constructed. As to the lands admitted to be owned by the Land Company, it was alleged that the entry thereon and the construction thereover of the line of the Railroad Company in the location in which the same was located, had been with the consent, knowledge, acquiescence and agreement of the Land Company and its predecessors in interest under an agreement that said Railroad

Company should pay therefor the sum of $1,000, which it was ready and willing to pay.

It was further alleged that the Railroad Company was the owner of lands located above the lands of the Land Company within the flow line of a dam sixty feet in height, which would be flooded by the construction, at the dam site involved in this case, of a dam to a height exceeding twenty-eight feet.

This, in general, is the position taken by each of the parties to this controversy.

The Court, after taking the testimony, in its original opinion, ordered that the complaint be dismissed. On rehearing, however, the Court determined the rights of the parties and declared the Railroad Company the owner of a right of way 200 feet in width over that part of the lands title to which was in the United States at the time of the entry of the railroad thereon and the approval of its map. Over that portion of the land which was owned by the Interior Development Company the lower Court determined that the Railroad Company was the owner of a right of way and had the right to maintain and operate its line as constructed by permission of the Interior Development Company; that as to the lands acquired by the Land Company from the Sherar heirs under the Hostettler option, the Railroad Company would be decreed to be entitled to a right of way thereover upon payment of $1,000 into Court within thirty days.

The Court, in view of this second decision, considered the case in the nature of a condemnation

suit and declared that the Railroad Company be required to pay the costs, in view of the fact that no tender of the $1,000 had been made to the Land Company prior to the commencement of the proceeding. The Land Company appealed from all that part of the decree except as to costs, and the Railroad Company filed a cross-appeal with reference to the decision of the Court awarding costs against it.

There is, accompanying the record, defendant's exhibit C, which shows the lands and location in question. The lands involved in this case, described in plaintiff's complaint, may be divided into four classes, to wit:

1. Those lands, the title to which was in the United States at the time of the commencement of this action. These lands are shown colored in brown on defendant's exhibit C.

2. Those lands, the title to which was in the Interior Development Company at the time of the commencement of this action. These lands are colored in yellow on defendant's exhibit C.

3. Those lands crossed by the line of the Railroad Company, title to which was derived from the Sherar heirs. These lands are colored in green on defendant's exhibit C.

4. The lands, title to which was claimed by the Land Company, but which are not touched or crossed by the line of the Railroad Company. These lands are shown outlined in green.

The line of the Railroad Company is shown in red on this exhibit. The right of way acquired from the United States Government south of the lands claimed to be owned by the Land Company, is shown in red, and that acquired from private ownership south of the lands claimed by the Land Company, is shown in yellow. The point marked "Dam site" on the map in question, is the point at which the notice of appropriation of water of the Interior Development Company was posted, and is the point referred to throughout the testimony in this case. The cross sections AA, BB, CC, DD, EE and FF on this map show the corresponding points on the profile on the upper end of the said exhibit.

ARGUMENT

I.

The relief sought by the Land Company's complaint cannot be granted by reason of the acquiesence of the Land Company in the construction of the Railroad Company's road over its land, with the knowledge that said road was being so constructed.

The relief sought by the Land Company in its bill of complaint was an injunction preventing the Railroad Company from maintaining or operating its railroad over and across the lands claimed to be owned by the Land Company. The acquiescence of the Land Company, however, in the construction of the Railroad Company's line, with knowledge of such construction, precludes it from removing the

railroad from the land. Even had it been found by the Court that the Land Company was the owner of the property claimed by it, yet by its acquiescence and failure to protest against the construction of the railroad, it waived the right to remove the railroad.

The law is well settled that where a land owner, knowing that a railroad has entered upon his land and is engaged in the construction of a road, without having complied with the statutes requiring either payment by agreement or proceedings to condemn, remains inactive and permits said road to go on and expend large sums in the work, the owner of the land is estopped from maintaining either trespass or ejectment for the entry, and will be regarded as having acquiesced therein, and will be restricted to a suit for damages.

> Roberts v. N. P. Ry. Co., 158 U. S. 1, 10-11.
> N. P. v. Smith, 171 U. S. 260, 274-275.
> Donahue v. El Paso R. R., 214 U. S. 499-500.
> Kindred v. U. P. R. R., 225 U. S. 595.
> City of N. Y. v. Pine, 185 U. S. 93, 99-100.
> U. S. v. Lynah, 188 U. S. 445, 467.

The work of construction over the property claimed to be owned by the Land Company was commenced in August, 1909, and was prosecuted diligently in August, September, October, November and December, 1909, and January, 1910, and in February the Railroad Company was still working on some of the heavier parts of it. The grade was

practically completed the latter part of February, 1910. (Testimony of G. W. Boschke, Trans. p. 331-2.) The Land Company had full knowledge of the fact that said line was being constructed on the lands in question, for it is alleged in the second amended bill of complaint (Trans. 22-23) "while it is true that the executors of the J. H. Sherar and the said Laughlin and the Interior Development Company and the engineers of your orator knew that the defendant had entered upon said lands and was constructing a railroad over the same, and while it is true that the said parties did not attempt, nor did your orator attempt until the bringing of this suit, to prevent the entry upon said lands by the defendant, or the construction of the said railway over said lands by the defendant, it is also true that the said Laughlin and the said Interior Development Company and the executors of J. H. Sherar were informed by the defendant that the railroad was being constructed in such manner as to permit the erection and maintenance by the owner of the lands described in the bill of complaint of a dam on the Des Chutes River * * * * sixty feet in height above ordinary low water of said river and that your orator had consented thereto."

Furthermore, it was shown in the evidence that J. W. Morrow, Tax and Right of Way Agent of the Railroad Company, on August 27, 1909, notified Huntington & Wilson, attorneys for the Sherar heirs, the owners of a part of the property, that

he, Morrow, had agreed with Mr. Martin, president of the Eastern Oregon Land Company, the holder of the option to purchase from the Sherar heirs, for the right for the Railroad Company to go upon the land and construct its line (Trans. p. 352-3). Mr. Huntington, of Huntington & Wilson, immediately and on the same day, to-wit, August 27, wrote Balfour, Guthrie & Company of Portland, Oregon, general agents of the Eastern Oregon Land Company, in which letter, among other things, he said: "We are in receipt of yours of the 27th and note your suggestion with respect to right of way. The assent of the representatives of the Sherar heirs to the crossing of the lands is conditioned entirely upon their obtaining the assent of the Eastern Oregon Land Company, or whatever person or company is the proposed purchaser under the Laughlin option. We have a letter from Mr. Morrow, dated yesterday, in which he states that he has seen Mr. Martin and obtained his consent that the Des Chutes Company proceed to build across the lands. He said, 'I am pleased to advise that I talked this matter over with Mr. Martin, of the Eastern Oregon Land Company, who has expressed a willingness to have us go upon the land to construct our line.' The representatives of the heirs are fully aware that they have no right at this time to consent to anything with respect to a right of way only as it meets your entire approval. If you or Mr. Martin have not given consent to their proceeding with the construction

of their road, it is obvious his, Morrow's mind should be disabused of an apparent impression he has received from the conversation with Mr. Martin." (Trans. p. 354.) The Sherar heirs, the owners of the property, therefore, had knowledge that the railroad was going upon the land to construct its road, and likewise the Eastern Oregon Land Company, the holder of the option to purchase, knew that said road was going there to construct under the apparent belief that it had agreed both with the Sherar heirs and with the Eastern Oregon Land Company so to do.

William MacKenzie, an officer of Balfour, Guthrie & Company, general agents of the Eastern Oregon Land Company, testified that a profile of the Des Chutes Railroad Company was submitted along in August or September or October, 1909, to the Eastern Oregon Land Company through Balfour, Guthrie & Company. (Trans. p. 225.)

John T. Whistler, an engineer employed by the Eastern Oregon Land Company, on October 6, 1909, reports to Balfour, Guthrie & Company: "Referring to your instructions by Mr. MacKenzie some ten days ago by telephone, to take up with the two railroad companies, *now building up the Des Chutes canyon,* the matter of their locations at Sherar Bridge Power Site * * * * Des Chutes R. R. Co.—Sherar Bridge Site: As I advised you he would do, Mr. Boschke at once turned over to

me blue print of their location and profi
miles above and below Sherar Bridge Si
pressed a readiness to give us any in
their office had, which would in any way
in considering the matter. The profile ha
does not show elevation above water su
river at proposed dam site, but Mr. Boschk
from what information he has in his office, hat he believes the location is about 70 feet above water surface at dam site. Our levels in conjunction with the elevations shown on profile would indicate that their location is only about 60 feet above water surface, but it is not certain which datum the bench mark from which our levels run refers, and I doubt if absolute assurance can be gotten without sending a man to the site to determine. In either case, however, I am reasonably certain the Railroad Company would object seriously to raising their location. An 0.8% grade was used by the company in climbing over the U. S. Reclamation Service's dam site, and this has been adopted as their maximum grade. From their profile, it appears they have used this to climb over the Sherar site, and to go higher would require them to change their location, not only throughout the entire climb, but as much farther north as necessary to obtain the increased elevation by length of line." (Trans. 226-229.)

Instructions having been given to Mr. Whistler ten days or so prior to the writing of this letter,

of [illegible] therefore, in September, at which time sho[illegible]as being constructed, and evidently the he[illegible]id construction was known to the agents tin[illegible]and Company who were in charge of the [illegible]. On receipt of this letter on October 6, [illegible]nt knew the line was being constructed and [illegible]e location was probably not over 60 feet abov[illegible] the surface of the water. Mr. William MacKenzie claimed in his testimony which was offered prior to the introduction of the letter from Huntington to Balfour, Guthrie & Company, above referred to, that he had talked with Mr. Morrow several times; that Mr. Morrow had spoken to him about a conversation he, Morrow, had had with Mr. Martin, president of the Eastern Oregon Land Company, on the train coming down from Salem, and their conversation on the subject of this right of way; that Morrow did not make any claim at that time that he had reached any agreement with Mr. Martin about the matter. On cross-examination, however, he testified (Trans. 222):

"I think my first intimation that Mr. Morrow claimed to have a right or permission from Mr. Martin to go on that land was in September, 1909. I don't think I communicated that information to Mr. Martin formally. I think the next time Mr. Martin came to Portland I talked to him about it. He was back and forth between San Francisco and Portland during that period periodically, not continually. *I did not write any letters to Mr. Morrow denying his claim, or questioning his authority*

for making any such statements. I thought Mr. Morrow's proposition so unthinkable that it was nothing short of a joke. Any railroad company that would expect to take the whole side of that canyon for a right of way for practically nothing at all, it would be absurd."

"Q. And you thought it so much of a joke that you wouldn't even communicate with Mr. Morrow, or take the trouble to write immediately to Mr. Martin about it.

A. I haven't said that I didn't write to Mr. Martin about it. I haven't said yet that I did not inform him, but so far as Mr. Morrow's talk was concerned, I did not take it at all seriously.

Q. But if you thought it was such a preposerous proposition, Mr. MacKenzie, wouldn't it be natural for a man of your business ability to take some means to ascertain the truth of such a rumor, and communicate with some person in authority to look into it?

A. No. I think if I were to take stock of all the preposterous things that arise I would be a very busy man.

Q. Even in connection with the agency which you are handling?

A. No, in connection with any agency or any business, one cannot busy himself with every ridiculous story that comes around.

Q. You just cast it out of your mind and let them go along.

A. I didn't take very much stock in it.

Q. And you didn't do anything to check the matter up or save the Des Chutes Railroad Company from proceeding on that assumption?

A. I think it quite probable that I mentioned Mr. Morrow's talk to Mr. Huntington, or to the Des Chutes Railway people just in the same way as I would mention anything else that had arisen about the property in a casual way. I was in touch with them off and on nearly all the time." (Trans. 222-24.)

As above stated, this testimony of Mr. MacKenzie's was given prior to the time the letter from Huntington to Balfour, Guthrie & Company of August 27th was introduced in evidence. The floating rumors referred to by Mr. MacKenzie that Mr. Morrow of the Des Chutes Railroad Company had agreed with the Eastern Oregon Land Company and secured its consent to go upon the lands, were undoubtedly the direct statement of Mr. Huntington in his letter to Balfour, Guthrie & Company that Mr. Morrow had advised him that he had agreed with Mr. Martin and that if this were not correct it was evident that Mr. Morrow was proceeding under a misapprehension and steps should be taken immediately to disabuse his mind. It seems to us that such a letter from the owner of the land which the Eastern Oregon Land Company were negotiating with should hardly be designated as floating rumors, nor should they warrant, nor would they have been received with the contemptuous

jocularity with which Mr. MacKenzie testified he received them, had it not been the fact that Mr. Martin and Mr. Morrow had agreed.

William MacKenzie was for years the land agent of Balfour, Guthrie & Company. Men of that character and capable of holding such positions know too well the consequences of permitting a person to go on and expend his money on the belief that a certain fact is true to permit the expenditure of hundreds of thousands of dollars, covering a period from August 27, 1909, to April 18, 1910, without protest or attempting to correct the impression. The understanding of Mr. Morrow was correct and known to be correct, or otherwise protest would have been made long before April, 1910.

Mr. MacKenzie states that he communicated these so-called floating rumors of Mr. Morrow's understanding to Mr. Martin, the president of the Eastern Oregon Land Company, on Mr. Martin's next visit to Portland after their receipt. This letter from Huntington to Balfour, Guthrie & Company was dated August 27, 1909. Mr. Martin was registered at the Hotel Portland in Portland, Oregon, from the 7th to the 9th day of October, 1909. (Testimony of Robe, Trans. pp. 516-17.) So that, provided Huntington's letter of August 27th was not sent to Martin at San Francisco, in any event it was communicated to him not later than October 7th, on his next visit here at Portland.

The claim of Mr. Morrow that he had agreed with Mr. Martin was true or Mr. Martin would have taken steps at that time to correct them. It is inconceivable that men of the business ability of Mr. MacKenzie and Walter S. Martin could have read that part of Mr. Huntington's letter which reads, "We have a letter from Mr. Morrow dated yesterday, in which he states that he has seen Mr. Martin and obtained his consent that the Des Chutes Company proceed to build across the lands. He said, 'I am pleased to advise that I talked this matter over with Mr. Martin of the Eastern Oregon Land Company, who has expressed a willingness to have us go upon the land to construct our line.' * * * * If you and Mr. Martin have not given consent to their proceeding with the construction of their road, it is obvious his, Morrow's, mind should be disabused of an apparent impression he has received from the conversation with Mr. Martin," and failed to take steps to disabuse Mr. Morrow's mind, provided the statements made by Mr. Morrow were not true. The only other possible alternative was that the claims of Mr. Morrow were perfectly true and known to be true by Mr. MacKenzie and Mr. Martin. This communication could hardly be designated as floating rumors because it was a direct communication from the attorney of the Sherar heirs, who owned the lands, to the company who held an option to purchase, and in response to a letter or communication from the Eastern Oregon Land Company warning the owners of the property

that such owners had no right to give the railroad a right of way across the lands while the option was outstanding in the Eastern Oregon Land Company. Notwithstanding this information and the employment of Whistler and his report of October 6th, 1909, to the effect that the line was constructed up the Des Chutes at an elevation thought by said engineer to be not in excess of 60 feet above low water, appellant admittedly made no protest until the beginning of this suit. (Complaint, Trans. p. 23.)

Mr. Broschke testified (Trans. pp. 332-33):

"Q. What, if any, steps, Mr. Broschke, were taken by anyone to stop the work of construction?

A. None whatever. I thought it was all settled. I got busy completing the railroad. I had an order to build it on the high line.

Q. Do you recall when it was you first heard of any protest against the construction of the line there?

A. Oh, I think the line was all done before I heard any protest. I don't—I think it was quite awhile afterwards. I don't recall anybody making protest at all until after the line was all built.

Q. Did Mr. Whistler ever make any objection to you that your line wasn't high enough for the purposes for which his client wanted to use the property there?

A. He spoke of the upper end, the way our grade lay, where the water came down, coming

down the natural grade of the river, would reach the water backed up from the dam; it would probably flood our grade in there. I said to him, that part of it, we would readily change that when the time came; when he had a dam there, but I did not believe in spending any money to change that at this time. He made no protest whatever as to the height at which our line was above the dam in that vicinity. He never attempted to stop us from going ahead, or tried to induce us to change our grade there. He never, other than that which I have just mentioned, indicated any dissatisfaction on the part of himself or the people whom he represented."

The Land Company has, therefore, stood by, knowing the line was being constructed at the height at which it was being constructed and acquiesced therein. It is, therefore, under the authorities above cited, too late to enjoin the use of the property, and the lower Court properly so refused to enjoin it.

II.

The Land Company did not acquire the property under representations that it had a right to construct a dam 60 feet high, and there is no estoppel against the Railroad Company to deny that fact. The Land Company acquired the property with full knowledge of the location and height of the line.

Prior to the completion of the trial the Land Company practically conceded that under the facts it would be unable to remove the Railroad Com-

pany from the land, and thereupon tried to prove as heavy damages as possible. The Land Company should, of course, win or lose on the case made in its complaint and sustained by its proof. The second amended complaint, upon which the Land Company went to trial, alleged as the grounds of its suit that it was the owner of certain specified lands along the Des Chutes River; that the Railroad Company had agreed with the predecessors in interest of the Land Company to construct its line at such a height as to permit the construction of a dam 60 feet in height above mean low water of the Des Chutes River at the dam site in Section 3, Township 14, S. R. 14 E., and that the Railroad Company had gone upon said land and was constructing its line under the representation that its line was of sufficient height to permit the construction of such dam as aforesaid; that the Land Company had purchased the land with the knowledge of such representation and agreement and had not discovered the fact that said road was not of sufficient height to permit the construction of a dam 60 feet in height until just prior to the commencement of this suit, and thereupon pleads that the Railroad Company is estopped to deny that its road is of sufficient height to permit the construction of a 60 foot dam. (Second Amended Complaint, Trans. 15 to 20.) The Land Company's proof, however, falls far short of proving this theory of the case.

In the first place, at the time of the commence-

ment of this suit, no claim or complaint was made whatever that the Land Company could not construct a dam 60 feet in height. Its only complaint was that it was not able to construct a dam in excess of 60 feet. Paragraph V of its original complaint reads as follows:

> "Notwithstanding the rights of your orator, and its ownership of said land, the defendant, without authority from complainant, and without right, and against the protest of complainant, has entered upon the lands of complainant above described and is now engaged in the construction of a railway over and across said lands; that said railway is so located that the construction over said lands will absolutely prevent the complainant from building a dam in the Des Chutes River on its said lands to a height *exceeding sixty feet,* and thereby the power which the complainant will be able to generate by means of the waters of the Des Chutes River on the lands above described will be greatly impaired and the cost of the power will be greatly enhanced and the maintenance and operation of said power plant when constructed will be greatly obstructed and imperiled."

Such claim, therefore, that said lands were purchased by the Land Company on the faith of the representations of the Railroad Company is untrue and is shown to be untrue by this allegation

in the original complaint admitting inferentially that said dam could be built to a height of 60 feet and basing its sole complaint on the fact that it could not be built to *exceed* that height.

The allegations of the second amended complaint to the effect that the land was purchased upon the faith of agreements or representations to the Land Company's predecessors in interest is further disproved by the allegations of paragraph VIII of the first amended complaint. (Trans. p. 651.) In this first amended complaint the Land Company alleges diametrically the opposite fact from that it is now seemingly trying to rely upon. Paragraph VIII of this first amended complaint reads as follows:

> "Complainant further showeth unto your Honors that defendant claims that the construction of its line of railroad over and across said lands is being done under license, consent and authority of the complainant and its predecessor in interest in said lands, and that said alleged license, consent and authority was given and granted pursuant to an agreement on the part of defendant to so construct its said line of railway as to permit of the construction of a dam in the Des Chutes River on the lands of complainant of a height of sixty feet above the low water mark of said river. In this regard complainant showeth unto your Honors that *it is informed by the agents and representatives of the predecessor in interest of*

your orator, with whom it is alleged said agreement was made, that no license or permission was ever given defendant to so construct its said line of railway as to permit of the construction of a dam in the Des Chutes River on the lands of complainant of a height of sixty feet above the low water mark of said river; and that in so far as complainant is concerned no consent, license or permission was ever given defendant to so construct its said line of railway on the lands of complainant as to permit of the construction of a dam on the Des Chutes River of a height of sixty feet above the low water mark of said river. * * * *"

This complaint was offered in evidence at the time of the trial and it will be seen that the Land Company here absolutely denies any contract for the elevation of the railroad sufficient to permit of the construction of a dam 60 feet in height with itself, and it alleges that it inquired of the representatives of its predecessors and that no such agreement existed with its predecessors. In view of such allegation, we do not see how it is possible for the Land Company at this time to expect to persuade this Court that it is acting in good faith when it alleges in its second amended complaint that such contract did exist with its predecessors and it purchased the property upon the faith of such contract. It certainly ought not to expect this Court to give much weight to its present claim.

In addition to the allegations of its original and first amended complaint, the Land Company has absolutely failed to prove its allegations of the agreement or understanding had with its predecessors in interest. These predecessors in interest are three as far as this controversy is concerned, to-wit: B. F. Laughlin, the Sherar Heirs, and the Interior Development Company. With reference to B. F. Laughlin the second amended complaint (Trans. 17) alleges:

> "Your orator further shows unto your Honors that it is informed and believes and therefore alleges that during said negotiations and before your orator purchased the Hostetler option from said Laughlin, it was agreed by and between the said Laughlin and the defendant railway company that the said defendant might enter upon the lands described in the contract between J. H. Sherar and wife and the said Hostetler, and locate and construct its railway line over the same, provided that the railway line should be so located, constructed, and maintained over said lands and over the lands above and below said lands that a dam sixty feet in height above ordinary low water in the Des Chutes River might be constructed in the Des Chutes River at any place on the lands in the said Hostetler option described. * * * *"

Mr. B. F. Laughlin, however, called as a wit-

ness on behalf of the Land Company, testified (Trans. pp. 518 to 519) as follows:

"I had a conversation with J. P. O'Brien, an officer of the Des Chutes Railroad Company, in regard to building a railroad over this property, which conversation I think took place in the latter part of February or first part of March, 1909. * * * * In that conversation Mr. O'Brien said he wanted me to get all the interested people to agree upon a price for a right of way on the river there, and at the same time guaranteed to protect the Sherar property to the fullest extent that it was possible. He called Mr. Boschke in and asked him about how they had run their grade on the river, and he said they had run it right along—a few feet from water. He told Mr. Boschke he would have to go back and re-run the line and save every foot of power for the Sherar property that could be saved. That they had examined the property with their engineer and that they might have to buy it before they got through, but to save every foot it was possible to save. Mr. Boschke remonstrated, said he would have to go back twelve miles. Well, he told him it didn't make any difference how far he had to go back, he must do it."

There is here no statement or proof of any agreement or understanding to protect a dam 60 feet above the low water mark. At most it was an understanding to save as much power as possible.

Again Mr. Laughlin testified (Trans. p. 529):

"I don't think any height of dam was mentioned by me. I don't have any recollection about that. We had planned upon a sixty foot dam, 60 foot above mean low water.

Q. Didn't you at that time agree that if they would elevate their line to a level that would be sixty feet above low water, or permit the construction of a dam sixty feet high, that they might go ahead with their construction?

A. *No sir, I did not.* I said they could go ahead with their construction at that time, provided they paid for it, at any height; if they wanted to pay for all the property they could go on water grade."

Again (Trans. 535) he testifies:

"Q. You say you talked sixty foot dam to Mr. O'Brien—did you talk sixty feet?

A. I would not say that I did; no sir; I would not say that; I might have had that in my mind and talked it and I might not. *I don't think I talked with Mr. Martin or to any of the Eastern Oregon Land people. Didn't tell them what the possibilities were there at all.* * * * *"

Again (Trans. p. 536):

"Q. In your conference with Mr. O'Brien and Mr. Boschke in the Wells-Fargo Building, you stated to them that it would be satisfactory to you

and to the people you represented for the railroad company to proceed and build on a right of way that would enable and permit the construction of a sixty foot dam, and that if they would do that and raise the line to that elevation, that you would see that the Des Chutes Railroad Company would be given the right of way for a nominal consideration.

A. *I did not. I had no talk with them or either of them to that effect.* * * * *"

Again (Trans. p. 537):

"Q. Now in your conversation over the 'phone, didn't you have an understanding with Mr. Morrow that they could proceed with construction across this property if that elevation was maintained by the railroad sufficient to go over a dam sixty feet high?

A. *I did not, at no time or at no place, nor in the presence of anybody at all.* I think Mr. Morrow was present at the conference I had with Mr. O'Brien and Mr. Boschke in February or March, 1909.

Q. Now, at that time and place, didn't you say to Mr. O'Brien and Mr. Boschke and Mr. Morrow that if they would raise the grade as high as they could, that you would be satisfied, and Mr. Boschke, the chief engineer, referred to his profile maps and stated that it was possible for him to reach a height so as to clear a sixty foot dam?

A. *It was not.*

Q. And you stated that that would be sufficient?

A. *I did not. The matter wasn't mentioned, any particular number of feet."*

It is evident, therefore, so far as Mr. Laughlin's testimony is concerned, it certainly falls far short of proving any such agreement or understanding as alleged by the complainant, to construct at a height sufficient to clear a sixty foot dam, and it not only does not prove the allegations of the second amended complaint that the Land Company had purchased the property and expended its money on the alleged representations of the Railroad Company to its predecessors in interest, that the line was to be constructed at a height sufficient to permit the construction of a 60 foot dam, but it flatly contradicts and disproves that allegation.

Mr. Laughlin was the holder of an option which was afterwards acquired by the Land Company, under which the Land Company acquired the Sherar property. The Land Company, in other words, stepped into the shoes of Mr. Laughlin.

Mr. Martin, president of the Eastern Oregon Land Company, in his testimony testified (Trans. p. 188) :

"Q. When did you first learn that the location of the road on the ground was such as to interfere with the construction of a 60 foot dam?

A. Well, this question of the construction of

a sixty foot dam is a thing I am not quite clear about. I understand that the railroad as now constructed is at 66 feet; that if the railroad company is satisfied with its own location, that all it has to fear is the flooding of its tracks in the flood season. It is physically *im*possible (?) to build a dam 60 feet there, but in case of flood the railroad right of way will be flooded. If that responsibility is up to them, why I don't know that I am concerned with it. If it isn't up to them, I am concerned."

Again (Trans. pp. 203, 204 and 205) Mr. Martin testified:

"A. One of the railroads had communicated with one of these representatives of this property, either the Sherar interests or Laughlin or Simmons; it was communicated to me, I think, in San Francisco—I am not sure if it was here. *What I said in reply to the thing was that if they do anything in regard to the right of way which damages the power value of that property, they do so at their own peril, and if they damage that property from the point of view of its power possibilities, we will feel free to retire from our contract.*

Q. Now, Mr. Martin, the railroad was practically constructed there before you paid any money in December, 1909, was it not?

A. Oh, the railroad was doing all kinds of things there.

Q. I mean it had men on the work and the grade

was practically completed at that time, across the Sherar property?

A. Well, I don't suppose that I was bound to assume that a perfectly illegal and violation proposition of that sort was binding on me.

Q. And you replied, if they interfered with the power proposition you would feel free to cancel it?

A. I don't believe it was a statement they had constructed and wanted permission; it was a request for permission to go upon the land. It didn't indicate that they had already built their road.

Q. To go upon the land?

A. To go upon the land.

Q. For what purpose?

A. For the purpose of building a railroad.

Q. Didn't you know before you paid any money the amount of construction that had taken place on that land?

A. No.

Q. You didn't care anything about that?

A. No. Oh, I don't say I didn't care. I didn't know.

Q. You didn't take any means to ascertain. You simply paid over your money irrespective of what had happened with reference to that desire of the Des Chutes Railroad Company to construct their line over that land?

A. *I ascertained that the people from whom we were buying the property had not in any way involved the property in any promises or agreements or deeds, or any act at all which involved the ques-*

tion of right of way. What remained to be settled if we bought was the question of whether the railroad had ever had any right to come on there at all, or not."

This is the only testimony by Mr. Martin with reference to any 60 foot dam or of any purchase by the Land Company on the strength of its knowledge of any agreement of the Railroad Company with its predecessors in interest. In fact, the testimony of Mr. Martin is positive to the effect that before purchasing he ascertained from his predecessors in interest that they had not in any way involved the property by any promises or agreements or deeds or any act at all which would involve the question of right of way.

Mr. William MacKenzie, agent of Balfour, Guthrie & Company, nowhere in his testimony refers to any such understanding. The negotiations between the Des Chutes Railroad Company and the Sherar heirs were carried on on behalf of the Sherar heirs by Mr. B. S. Huntington, their attorney, and by Mr. Grimes, one of the executors of the Sherar estate. There is absolutely no statement in Mr. Huntington's testimony as to any agreement to go to a height of sixty feet. The only understanding had in this regard was contained in the letter of Huntington & Wilson to J. W. Morrow, dated August 25, 1909, which reads (Trans. 175) :

"Confirming our telephone conversation of

this afternoon the executors of the will of J. H. Sherar, deceased, and who also are attorneys in fact for several of the heirs, are willing that the Des Chutes Railroad Company shall proceed with the construction of its road across the Sherar lands in the Des Chutes Canyon, provided the road is constructed sufficiently above the river as that it will not interfere with the use of the property for hydraulic purposes, and the persons who have agreed to purchase the property consent. The executors understand that if the persons who have agreed to purchase do not take the property that your company will pay one thousand dollars for the right of way. If the sale is consummated, as we assume it will be, then you are to settle with the purchasers for the right of way."

Mr. Grimes, one of the executors of the Sherar estate, testified (Trans. p. 542):

"Q. Mr. Morrow states, Mr. Grimes, that in the said negotiations for the purchase of the right of way you stated to him that the principal value of the lands lay in their availability for a power site; that the construction of a line of railroad would enable them to develop this water site, whereas without a railroad it would be practically impossible, and therefore as to the consideration for the right of way, so far as you were concerned you would be glad to donate the right of way in order to secure the construction of a line of railroad, but

that in view of the fact that there were many heirs to the estate it would be impossible to satisfy them without a consideration, and that you and he then agreed upon a consideration of one thousand dollars to be paid for the right of way through the Sherar estate property, and that you further agreed that the line of railroad should be built at such a height as to permit of the construction of a sixty foot dam. Now what do you remember about anything occurring from which Mr. Morrow made this statement?

A. I have no recollections of any such talk as that outside of Mr. Huntington's office, which I have just stated there before.

Q. Was anything said between you and Mr. Morrow when you and he were together alone, outside of Mr. Huntington's office?

A. In regard to this matter?

Q. Yes.

A. I have no recollection of anything being said.

Q. No conversation of that kind occurred between you two?

A. No, sir."

On cross-examination he testified (Trans. p. 547):

"Q. You didn't have any negotiations at all in regard to a dam site there with the railroad company?

A. Not any more than they were notified, that

is in our talk with Mr. Morrow, that if we gave them a right of way through there they would have to keep high enough to protect the dam site.

Q. How high a dam site would they have to protect there?

A. I had nothing to do about the figures that the dam site was to be, the height they were to keep. It was supposed to be from 60 to 65 feet, my understanding was.

Q. Wasn't it fifty-five feet you were talking about?

A. No sir, I don't think so. I never heard of any 55 feet.

Q. What did Mr. Morrow say about keeping up there to protect the dam site?

A. I have no recollection of his making any reply whatever."

Thus with regard to the purchase of the Sherar property, there is no testimony as to any such understanding, agreement or representation as is alleged in appellant's second amended complaint. Mr. B. F. Laughlin, the holder of the option to purchase, testified positively that he had no such understanding or agreement or representation. Mr. Huntington's letter is simply to the effect that the line should be sufficiently high that it would not interfere with the property for hydraulic purposes. Mr. Grimes had no understanding as to height and Mr. Martin, the president of the purchaser, likewise had no understanding as to height. So that

as far as the Sherar property is concerned, certainly the testimony is far short of proving that the same was purchased by the appellant under any representation whatever as to the height of the dam which the road should clear.

With reference to the Interior Development Company, the second amended complaint alleges (Trans. p. 16): "At the time such negotiations were commenced the Interior Development Company owned the northeast quarter of the southeast quarter of Section 9 above described, and also was claiming the northeast quarter of the northeast quarter of section 3 above described * * * *; and your orator is informed and believes and therefore alleges that it was agreed between the Interior Development Company and the defendant that the defendant should have the right to go upon the lands owned by the Interior Development Company and the lands claimed by the Interior Development Company, as above set forth, and construct its railroad over the same and upon the lands above said lands claimed and owned by the said Interior Development Company, provided that the railway line to be constructed over the said lands by the defendant should be constructed at such an elevation above the water of the Des Chutes River that the construction and maintenance of the defendant's railway line should not interfere with construction and maintenance of a dam sixty feet in height above ordinary low water in the said river where the

said river runs through the northeast quarter of the northeast quarter of said section 3 and above the falls of said river, and the defendant Railway Company agreed to so locate, construct and maintain its said railroad as to permit the construction, maintenance and enjoyment of a dam in the Des Chutes River above the falls thereof sixty feet in height above ordinary low water in said river at said point."

In order to prove this allegation of the second amended complaint, the Land Company called as a witness Mr. A. Welch, president of the Interior Development Company. The understanding and agreement between Welch, on behalf of the Interior Development Company, and the Railroad Company, was much more definite than with any of the others. Mr. Welch was an active, practical operator. He had his plans for his developments already drawn and in discussing the matter with the Railroad Company, he brought his plans with him. Mr. Welch testified as follows (Trans. p. 232):

"I was connected with the Interior Development Company during 1908 and 1909. * * * * During the year 1909 I went to the office of Mr. O'Brien, president of the Des Chutes Railroad Company, in the Wells-Fargo Building, some time I think in September, in company with Mr. Isaac Anderson of Tacoma. We took some maps of the Des Chutes River—and went over to find out how high the

railroad would be at the point of the dam site. We met Mr. O'Brien and talked over the matter, and he told us he would take us down to Mr. Boschke's office and show us the maps of the river, their surveys. We went down to Mr. Boschke's office and he showed us the maps. During our conversation Mr. O'Brien told him that we were one of about 150 filings that should be taken care of on the Des Chutes River. Mr. Boschke said that he had run his lines, and asked for the maps showing the height, which we examined. Then they asked about the right of way and we told them that if they would protect our filing, there would be no charges for the right of way. We specified the height of the dam as sixty feet, that we desired. The representative of the railroad company said that he had taken that into consideration. They showed us the maps of the railroad grades and heights, which showed, as I remember it, between 64 and 65 feet above low water. They had at that time already raised their levels to that height before we made a request for it. We discussed with them our water filing and they said they were familiar with it. * * * * We decided that that height would satisfy us as far as the railroad was concerned—I mean the height allowing for a sixty foot dam."

On cross-examination, Mr. Welch testified (Trans. 234):

"Q. You are still president of the Interior Development Company, are you?

A. Yes, sir.

Q. You are still interested in that property, are you, individually?

A. Yes, sir.

Q. Now when you went to the railroad company's office, they produced the profile showing the height of the proposed railroad at that place. Is that correct?

A. Yes, sir.

Q. And you expressed your satisfaction with that?

A. Yes, sir, with the map.

Q. And did you consider that that elevation would permit you to construct the dam in the manner in which you desired?

A. We were satisfied we could construct a dam so we could get sixty foot fall.

Q. And how had you in mind to construct the dam for that purpose?

A. Well, we had in mind putting in some floodgates one way; and another one was with splash boards.

Q. And that was practicable, you considered?

A. We considered it was practicable, yes.

Q. And you desired to have the railroad constructed there at that time, did you not, Mr. Welch?

A. How is that?

Q. *I say you were anxious to have the railroad constructed there at that time, provided you could still maintain your power development?*

A. *Yes, sir.*

Q. *In that manner?*

A. *Yes, sir.*

Q. *And you so expressed your satisfaction to Mr. O'Brien and Mr. Boschke. Is that not correct?*

A. *Yes, sir.*

Q. *And advised them that they could go upon the land and construct on the elevation shown on that profile, and if they did so, that they could have the right of way free of charge, as far as the Interior Development Company was concerned?*

A. *Yes sir, that was the understanding.*

The Court: *Mr. Welch, what did you say Mr. Boschke said the elevation of the road would be above water?*

A. *Above low water?*

The Court: *Yes.*

A. *The map he showed us was between, as I remember it now, between 64 and 65 feet.*

The Court: *Sixty-four or 74?*

A. *Sixty.*

The Court: *That is sixty-four?*

A. *Or five feet.*

The Court: *Yes, 64.*

Q. (Mr. Wilson.) *That is above low water surface?*

A. *Yes sir, above the low water surface.*

The Court: *You thought you could construct a*

sixty foot dam without interfering with the railroad; is that what you thought?

A. *That was our opinion, yes sir.*"

As far as the property acquired from the Interior Development Company is concerned, therefore, with the maps and profiles upon which the road was constructed, together with the maps of the dam before them at the time of the interview between the president of the Interior Development Company and the officers of the Railroad Company, at which time, with a full understanding of the height at which the railroad would be, to-wit, 64 or 65 feet above mean low water, it was agreed that if the Railroad Company should build on that elevation it should have its right of way across the lands of the Interior Development Company free of charge. It was also understood at that time that the clearance in question would give sufficient room to maintain the water level at sixty foot elevation without interfering with the operation of the railroad.

Here was a definite agreement and understanding between the parties and is contrary to the allegations of the complaint, provided it is the intent of the complaint that the appellant should have free room over the dam and was not required to take care of the flood waters. In other words, the understanding of the Interior Development Company and the Railroad Company was that the Interior Development Company would be able by the

use of splash boards or other means, to take care of the flood-waters within the distance allowed and maintain the water at a sixty foot elevation.

One tract of the lands owned by the Interior Development Company was right at the dam site, to one part of which the dam would have to be anchored. The other tract of land owned by the Interior Development Company was the NE¼ of the SE¼ of section 9, township 4 south of range 14 east, and within the flow line of the dam. The Land Company acquired this property of the Interior Development Company subsequent to this agreement and subsequent to the construction of the line. In fact, the NE¼ of the SE¼ of section 9 was not acquired until August 2nd, 1910, and lot one, being the NE¼ of the NE¼ of section 3, township 4 south of range 14 east, the property right at the dam site, was not acquired by the Land Company until the 4th day of April, 1914 (Stipulation, Trans. p. 171, paragraph 19) about one week prior to the trial of the case.

As to these properties acquired from the Interior Development Company, therefore, the line was built under permission and in full compliance with the agreement of the parties, and the Railroad Company has earned its right to a right of way over the same.

Mr. Welch was president of the Interior Development Company during all of the negotiations and still remained such at the time of the trial. (Trans. p. 234.) He and E. P. McCornack of Salem

owned all the stock of the Interior Development Company and Mr. McCornack was satisfied with the arrangement Mr. Welch had made with the Railroad Company. (Trans. p. 237.)

We have then this situation: The Land Company alleging agreements of the Sherar Heirs, Laughlin, and the Interior Development Company, its three predecessors in interest, with the Railroad Company of a right to go on the lands in question to construct, provided it did construct at a height sufficient to permit the construction of a dam 60 feet in height, and further alleging that the Land Company purchased with knowledge of these agreements and that thereby the Railroad Company is estopped to deny that it is required to so construct. The proof offered by it as to two of its predecessors, to-wit, Laughlin and the Sherar Heirs, absolutely denied any specific height, but simply asserted an agreement to protect the property for power development. As to the Interior Development Company the proof showed a specific agreement that the Railroad Company be permitted to construct in the exact location in which the line is constructed, and it being understood that a dam 60 feet in height could be maintained with the railroad at that location. As to any representations made to the Land Company upon which it relied for the purchase of said property, said witnesses are either absolutely silent or flatly deny any such representations, and in addition, the testimony of Mr. Martin, the president of the Land Company himself, is

positively to the effect that before purchasing the property he ascertained from his predecessors in interest that the said predecessors had not in any way involved the property in any promises, agreements, or deeds or any act at all which involved the questions of right of way. In addition to this oral testimony, the original and first amended complaint filed by the Land Company absolutely contradict such allegation.

Under such circumstances there certainly was no estoppel against the Railroad Company. No money was spent nor was the Land Company placed in any disadvantageous position by any representations made by the Railroad Company.

III.

The Interior Development Company owned the only water appropriation on the river, and that Company's agreement with the Railroad Company was binding upon the Land Company as far as said water right is concerned.

The only water right or right to construct a dam of any kind acquired by the Land Company or any of its predecessors was that acquired and held by the Interior Development Company. (Plaintiff's Exhibit 19, page 623 of the Transcript.)

Considerable stress was placed upon this water right by the Land Company and among the costs of the property to the Land Company it was shown that fourteen or fifteen thousand dollars had been

paid in development work for the purpose of keeping this water filing alive. (Testimony of Martin, Trans. 206-210.) The Eastern Oregon Land Company has never adopted a plan of development. (Trans. pp. 207-208.) The only water right, therefore, acquired or owned by the Land Company or any of its predecessors in interest was this right of the Interior Development Company, and this was owned by the Interior Development Company at the time of the understanding between Mr. Welch of that company and the Railroad Company to the effect that if the line were built at its present location, the same would be satisfactory to the Development Company. If the Land Company has acquired this water right, it is subject to the understanding and agreement had between Welch and the Railroad Company. If the Land Company has not acquired this right, then it had not at the time of the trial, and has not today any right to appropriate the waters of the Des Chutes River or to construct a dam therein.

IV.

The understanding and agreement of the parties was that if the line of the defendant Railroad Company were constructed at its present elevation across the lands in question, it would be sufficient. In any event, the Land Company and its predecessors in interest are by their actions and admissions estopped to question that fact.

We have pointed out in the foregoing part of this brief the testimony in the record, with reference to the negotiation between the Land Company and its predecessors in interest and the Railroad Company. So far as the Interior Development Company is concerned, there can be no doubt that the agreement between these parties, with the maps of the developments of both concerns before them, was definite to the effect that if the line were located as at present constructed, it would be sufficient for the development contemplated by the Development Company, and it was agreed between the parties that the Development Company should have the right to construct and could construct with the line of the Railroad Company as at present constructed, a dam of 60 feet, by making proper provisions in the dam to take care of any flood-water. With reference to B. F. Laughlin, the Sherar heirs, and the Land Company itself, in view of the conflict of the testimony, the lower Court refused to find that any agreement existed between them, and assessed the damages by reason of the construction of the

line across said lands of the Sherar property. (Opinion on rehearing, Trans. 121.)

We think that the lower Court would have been justified in holding, under the evidence, that the said Laughlin, Sherar heirs, and the Land Company, are estopped to question that the line was constructed in its present location on the understanding that the development of the property for hydraulic purposes would not be interfered with and that the damages for construction would be nominal.

Considerable space is devoted in the brief of the Land Company to an attempt to show that the lower Court had actually held the Land Company estopped as here contended. We do not so read the opinion of the lower Court, but do maintain that such holding was justified under the facts. In the first place, the consent of the Sherar heirs was given provided the road was constructed sufficiently above the river "as that it shall not interfere with the use of the property for hydraulic purposes." (Trans. p. 175.) Mr. B. F. Laughlin induced the Railroad Company to raise its survey for the purpose of saving the power possibilities of the property, and while it is true he asserts the Railroad Company was to pay him whatever damages it did to the property and the power development, yet the testimony of all of the witnesses for the Railroad Company was to the effect that if the Railroad Company did raise its grade to a height of from 45 to 60 feet, Laughlin would be satisfied and indicated

that the damages would be nominal. (Testimony of O'Brien, Trans. pp. 319 and 320. Testimony of Boschke, Trans. pp. 328 *et seq.* Trans. 344 and 345.)

With reference to the Land Company itself, Mr. J. W. Morrow, Tax and Right of Way Agent of the Railroad Company, on August 27, 1909, advised Huntington & Wilson, attorneys for the Sherar heirs, as follows: "And at this time I am pleased to advise that I talked this matter over with Mr. Martin of the Eastern Oregon Land Company, who has expressed a willingness to have us go on the land and construct our line" (Trans. p. 353), and on the same date Huntington & Wilson advised Balfour, Guthrie & Company, the general agents of the Eastern Oregon Land Company, as follows:

> "In re Sherar lands. We are in receipt of yours of the 27th and note your suggestions with respect to rights of way. The assent of the representatives of the Sherar heirs to the crossing of the lands is conditioned entirely upon their obtaining the assent of the Eastern Oregon Land Company or whatever person or company is the proposed purchaser under the Laughlin option. We have a letter from Mr. Morrow, dated yesterday, in which he states that he has seen Mr. Martin and obtained his consent that the Des Chutes Company proceed to build across the lands. He said, 'I am pleased

to advise that I talked this matter over with Mr. Martin, of the Eastern Oregon Land Company, who has expressed a willingness to have us go upon the land to construct our line.' The representatives of the heirs are fully aware that they have no right at this time to consent to anything with respect to a right of way only as it meets your entire approval. If you or Mr. Martin have not given consent to their proceeding with the construction of their road, it is obvious his, Morrow's, mind should be disabused of an apparent impression he has received from the conversation with Mr. Martin. In our telephone talk and in our letter confirming the same we conditioned the assent of the heirs upon their obtaining the assent of the persons who have agreed to purchase the property, and Mr. Morrow must understand that we are not in any way consenting to any act which is not entirely assented to by you." (Trans. 353, 354.)

This letter was undoubtedly the floating rumors which Mr. MacKenzie of Balfour, Guthrie & Company referred to in his testimony, as follows (Trans. p. 221):

"Q. When did it first come to your knowledge that the Railroad Company claimed to have any permission for a right to be upon those lands because of any conversation with Mr. Martin? That is, was it before or after the bringing of this suit?

A. I think some time in the early part of September there was some floating talk came to me about it. I cannot recall exactly where it came from. * * * *"

And again on cross-examination (Trans. p. 222):

> "I think my first intimation that Mr. Morrow claimed to have a right or permission from Mr. Martin to go on that land was in September, 1909. I don't think I communicated that information to Mr. Martin formally. I think the next time Mr. Martin came to Portland, I talked to him about it. He was back and forth between San Francisco and Portland during that period, periodically, not continually. I did not write any letters to Mr. Morrow, denying his claim, or questioning his authority for making any such statements."

Mr. Martin, president of the Land Company, was registered at the Portland Hotel in Portland from August 20th to the 26th, and from October 7th to the 9th. (Trans. p. 517.) He was therefore here on the date on which Mr. Morrow advised Huntington & Wilson he had received Martin's consent, and as he was here from the 7th to the 9th of October, Mr. MacKenzie, of Balfour, Guthrie & Company, must have communicated to him at least by that time the information which he had received from Huntington & Wilson as to Mr. Morrow's claim. Prior to this time, however, Mr. Whistler, an engi-

neer, had been employed to examine the project and determine where the line of the defendant was to be constructed. He had been given the profile and map of the Railroad Company and on October 6th, the day before the arrival in Portland of Walter S. Martin, the president of the Eastern Oregon Land Company, Mr. Whistler wrote to Balfour, Guthrie & Company, the agent of the Land Company, as follows (Trans. pp. 228, 229):

> "Deschutes R. R. Co.—Sherar Bridge Site: As I had advised you he would do, Mr. Boschke at once turned over to me blue-print of their location and profile for some miles above and below Sherar Bridge Site and expressed a readiness to give us any information their office had, which would in any way assist us in considering the matter.
>
> "The profile handed me does not show elevation above water surface of river at proposed dam site, but Mr. Boschke states from what information he has in his office, that he believes the location is about 70 feet above water surface at dam site. *Our levels in conjunction with the elevations shown on profile would indicate that their location is only about 60 feet above water surface, but it is not certain which datum the bench mark from which our levels run refers, and I doubt if absolute assurance can be gotten without sending a man to the site to determine.*
>
> *"In either case, however, I am reasonably certain the Railroad Company would object*

seriously to raising their location.. An 0.8% grade was used by the company in climbing over the U. S. Reclamation Service's dam site, and this has been adopted as their maximum grade. From their profile, it appears they have used this to climb over the Sherar site, and to go higher would require them to change their location, not only throughout the entire climb, but as much farther north as necessary to obtain the increased elevation by length of line."

Mr. Martin on his stay in Portland from October 7th to 9th undoubtedly considered this report of Whistler on the Sherar property and the information which he had received as to the exact location and height of the railroad line, and the further fact that the Railroad Company would object to raising the same. Whistler undoubtedly secured this information as to the objection of the Railroad Company to raising the same from Mr. Boschke, the Chief Engineer of the Railroad Company, when he saw him in connection with this project and when the map and profile were furnished him by Mr. Boschke. Mr. Martin knew that this line was perhaps not over 60 foot above the low water mark. The Railroad Company, in making the survey, had climbed on its maximum grade, in accordance with its statement to Mr. Laughlin that it would do, prior to the change of the survey. At the same time Mr. Martin received the report of Whistler, he must have been advised of the claim of Mr. Morrow that

he had received Mr. Martin's consent to go upon the land and construct, because October 7th was Mr. Martin's next visit to Portland, after MacKenzie had received the information of such claim from Mr. Huntington's letter. (Trans. p. 223.) Therefore Mr. Martin must have received at one and the same time the information contained in the Whistler report as to the exact elevation at which the road was being constructed, and also the fact that Mr. Morrow was claiming that the Railroad Company was going upon said land with his, Martin's, consent.

Yet, notwithstanding these facts, Mr. Martin made no objection to the Railroad Company nor claimed that the said line was not being constructed in accordance with his understanding with the Railroad Company, but he remained silent and permitted the Railroad Company to go ahead and construct its line and spend its money on the faith of the fact that said line was being constructed in accordance with the understanding with him, and his predecessors in interest, and in the face of the warning from Mr. Huntington, an attorney for the Sherar heirs, that if the line was not being constructed in accordance with the understanding with Mr. Martin, that Mr. Morrow's mind should be disabused, as he was acting upon such understanding. We submit, therefore, either that the railroad was being constructed in exact accordance with the understanding of the parties, or, if not, then the Land Company is estopped to deny it.

Considerable space is devoted in the Land Company's brief to an attempt to show that no estoppel exists as against the Land Company, and a number of authorities, in attempting to sustain their theory, are cited. Within the State of Oregon, however, the matter is determined by a provision of our Code, Section 798, Subdivision 4, Lord's Oregon Laws, which reads as follows:

> "Whenever a party has by his own declaration, act, or omission, intentionally and deliberately lead another to think a particular thing true, and to act upon such belief, he shall not in any litigation arising out of such declaration, act, or omission, be permitted to falsify it."

Mr. B. F. Laughlin, the holder of the option which was afterwards acquired by the Land Company, induced the Railroad Company to raise its survey, and spend its money to make such re-survey, on the understanding and belief that the same would protect the water rights and development which he claimed to own. The Sherar heirs gave their consent on the understanding that the property would be protected for power development.

The president of the Land Company, himself, and the agents of the Land Company, Balfour, Guthrie & Company, knew exactly where the Railroad Company was constructing, and that it was constructing under the belief that said line would protect the water development and prevent any claims of damage on the part of the Land Company. They knew

these facts when the grading was in its incipient stage. They were warned by the attorneys for the Sherar heirs on August 27, 1909, that the Railroad Company was proceeding under such belief and that if such were not the fact the Railroad Company's agent's mind should be disabused of the impression under which it was acting. These facts, we submit, show at least an intentional and deliberate omission on the part of the Land Company to act when it should have acted, and such intentional and deliberate omission, under our Code, estops it from denying that the line is constructed at the point where it was agreed it should be constructed, or at a point where it would protect the property of the Land Company for power development. When the parties in their letters and in their negotiations were using the expression, "that the power development of the property be protected," such expression must be interpreted in the light of the developments which such properties permitted, and in arriving at the meaning of that expression, it is pertinent to inquire what development the properties permitted.

The Sherar property did not extend further south on the east side of the river than the northwest quarter of the southwest quarter of section 10, township 4 south, range 14 east, and the furtherest south of any property on the east side of the river acquired by the Land Company was and is the northeast quarter of the southeast quarter of section 9, which was one of the properties acquired from the Interior Development Company. South of this point,

on the east side of the river, the Land Company had acquired no rights, and it could therefore not raise the water of the river above this point. No dam could be constructed at the dam site in question to a height in excess of 28 feet that would not raise the water above the south line of the northeast quarter of the southeast quarter of said section 9. (Testimony of Kelly, Trans. p. 455.)

Mr. Martin, president of the Land Company, admitted this fact when he testified (Trans. p. 206): "There are lands in private ownership that would be under the flow line of the reservoir with a dam 60 feet high, that the Eastern Oregon Land Company does not own. The Eastern Oregon Land Company would have to acquire such rights before it could construct a dam, and it hasn't such rights today."

So that, when the parties were negotiating and used the expression "that the line be raised sufficiently to protect the power development of the properties," those power developments of the properties were limited to a raising of the water but 28 feet at the dam site in question.

It is asserted in the brief of the Land Company (we are not able to refer to brief of the Land Company as we have been furnished only with typewritten notes): "But it is admitted that the road as built does not conform to the agreement with the Sherar executors, either as stated in the Huntington letter or in the testimony of Morrow," and again it is stated, "It is the admitted fact that the

road as constructed does interfere with the use of the property for hydraulic purposes." We are at a loss to know whence counsel deduces such admissions. We have maintained throughout and proved, and the fact is nowhere disputed by the Land Company, that the property of the Land Company does not permit of a development which raises the water to a height in excess of 28 feet at the dam site. The line does fully comply with the understanding expressed in Huntington's letter to Morrow that "it (i. e. the line) will not interfere with the use of the property for hydraulic purposes," and likewise with the arrangement with Laughlin, the holder of the option, as testified to by him, that the power development of the properties be protected.

The line is likewise high enough to permit of the construction of a dam 60 feet in height as determined by the Interior Development Company and the Railroad Company. This was the practical construction placed upon the agreement by the companies at that time with the plans of both before them. It was likewise the understanding of all the others. The Court should consider the question which was before them before the line was constructed, to-wit: How high can the railroad raise its line? And how will this permit the dam to be constructed? The power developers were wanting to get as much power as the line would permit. The president of the Interior Development Company and the Railroad Company determined with

their plans before them that the height of the line permitted the construction of a dam in a certain manner of 60 feet, and it is not disputed today that the dam of such character can be constructed without interference.

The Interior Development Company had the only appropriation which permitted the construction of any dam whatever and the very right under which the Land Company today is claiming the right to construct. This fact having been thus determined with reference to this identical dam site and with reference to the only appropriation of water at that point and with the company which owned the right and the only right to develop it, was quite naturally considered by the railroad officials as fully settled and determined, and the testimony of Mr. Morrow on which the Land Company lays so much stress, should be considered in the light of such fact. Mr. Morrow testified (Trans. p. 359):

"Q. Then in that conversation it was agreed that the elevation should be sufficient to allow the building of a 60 foot dam?

A. Well, I don't think so, Mr. Minor. Now, I will tell you about that 60 foot dam. I am satisfied Mr. Boschke said he could reach an elevation—if not positively—I think positively of 60 feet. That is the way I have it in my mind. And the dam site or the dam—I think that I reached that conclusion subsequently, and after the survey was made, and

had an understanding that it was possible to construct a dam at the height of 60 feet. * * * *"

And again, at page 361, he testified:

"Q. Mr. Grimes insisted and you agreed that the railroad should be built at such an elevation as to admit of the construction of a 60 foot dam?

A. No, Mr. Grimes never insisted upon any particular height at all; nor did Mr. Huntington. It was simply my statement to them that we could do that, to which they offered no objection, but were satisfied with it.

Q. But it was agreed that the railroad should be built at an elevation to admit of the building of a 60 foot dam?

A. I negotiated with them, as I believe, with that understanding."

And again at page 363:

"In all our negotiations with any parties interested in that property, the principal point of contention was the height of the dam; the power sites were always interested, in avoiding the possibility of interfering with the construction of the dam, and in all these negotiations, the height was always at a 60 foot level above the low water flow of the Des Chutes River, according to my understanding of it, and I think that is right.

Q. In other words, in all your conversations with all these parties, they all insisted that you

should build your railroad to such a height as to permit of building a 60 foot dam?

A. No, they never insisted. They never insisted. The fact of the business is there wasn't such a great amount of obligation put upon this dam site. *I gathered the information after the line was surveyed* that we could build—that we would build at an elevation admitting of the construction of a dam at that height; and I think it was entirely my suggestion to these people, to which they never offered any objection. I don't think the height of the dam was seriously discussed."

This belief and understanding of Mr. Morrow, which he said he derived after the survey was made, that a dam 60 feet high could be built, undoubtedly emanated from the definite understanding between Welch of the Interior Development Company and the railroad officials, to which Mr. Welch testified: Such a dam can be built and is practicable.

(Wickersham, Trans. pp. 430-434.
Kelly, Trans. pp. 458-462.
Welch, Trans. pp. 235-236.)

These matters were undoubtedly understood by all parties up until after the commencement of this suit. The plaintiff itself so understood. As we have already pointed out, its original complaint was on the ground only that its right to construct *in excess of 60 feet* was interfered with.

Although the Land Company had full knowl-

edge of the exact location of the line and the fact that the line had been under construction since August, 1909, and that it was being constructed under the belief on the part of the Railroad Company that it was satisfactory to the Land Company, it made no protest or objection to the Railroad Company until after the J. G. White report on the power project had been received in March, 1910. Mr. Martin testified (Trans. p. 197):

"Q. And you never made any objection to the company on account of the method in which they were constructing their line, on account of any information that was furnished you or otherwise?

A. I did.

Q. At what time?

A. I came up here as soon as I received the J. G. White report and I went to see Mr. Morrow, and I told him what was contained in this J. G. White report. The preliminary J. G. White report was made on March 3rd, 1910.

Q. And that was five months after the line had been constructed across that property.

A. Well, I can't help that; you asked me when we objected. I objected as soon as I had information on which to base an objection."

The objection when made by the Land Company was not that the line prevented the construction of a dam 60 feet in height, but that it prevented construction in excess of that height. Mr. Martin testified (Trans. p. 213):

"The best of my recollection of my interview with Mr. Morrow, the right of way agent of the defendant company, in March, 1910, is that I had received a report from J. G. White & Company, which had been made up for the purpose of determining which was the most efficient and economical plan for the development of the Sherar Bridge property; that their recommendations were in favor of a dam very much higher than anything that had been spoken of in connection with the site above, which was over one hundred feet, and that if we could reach a conclusion that would be amicable, I was willing then to agree on a right of way, contemplating less than the whole height which they recommended, but as we had associates in this property and as the property represented the expenditure of a good deal of money in the purchase, we could not give them a right of way without charge, but we would therefore have to ask for damages on the basis of the opportunity we had there."

It was only, therefore, after J. G. White & Company had made a report that the economical height of a dam was in excess of 100 feet, that any controversy arose, and it was only for the purpose of enforcing some right in excess of 60 feet, which the Land Company conceived it had, that this suit was brought. The Land Company had, however, waived its rights above 60 feet and this fact developed in the application for a preliminary injunction. It was then for the first time that the Land Company advanced the theory that it could not construct to 60

feet or that it should have the right to construct a dam without providing for taking care of the flood-waters as contemplated in the negotiations as above pointed out. This contention of the Land Company was an afterthought and a contention forced by the necessities of the case.

The Land Company having taken the position that its complaint was on account of the inability to construct in excess of 60 feet, and never having made any complaint and having acquiesced in the construction of the line as at present constructed, is estopped at this time to raise the question that the line is not built in accordance with the understanding, or is insufficient to permit of the construction of a dam 60 feet in height or to protect the water development of the property.

As said by this Court in the case of Polson Logging Company vs. Neumeyer, 229 Fed. 707:

> "The objections now relied upon to defeat the action were confessedly not made until about a week before the actual trial of the case and long after the suit had been brought and more than a year after the steel had been shipped to the purchaser, during which time the respective parties were disputing by telegraph and letter over the fact of the alleged sale and the alleged fraud and lack of authority on the part of their respective employees. We think the objections now relied upon were made altogether too late. It is quite true that mere

silence at a time when there is no occasion to speak is neither a waiver or evidence from which a waiver may be inferred, especially when unaccompanied by any act calculated to mislead the party. But surely a buyer of merchandise must either accept or reject it when tendered by the seller and is bound to do one thing or another within a reasonable time. In the present instance the buyer made no objection within any reasonable time to the overweight of the steel nor to the length of the bars but based its refusal to accept the shipment exclusively upon the grounds above stated, which grounds the jury found were without any foundation."

The Court then quotes as authority a great many cases. In the case of Railway Company vs. McCarthy, 96 U. S. 258, 267, the Court says:

"Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot after litigation has begun change his ground and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold. He is estopped from doing it by a settled principle of law." Quoting numerous cases.

In Davis vs. Wakelee, 156 U. S. 689, the Supreme Court of the United States again says:

"It may be laid down as a general propo-

sition that where a party assumes a certain position in a legal proceeding and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him."

The same principle was applied by the United States Supreme Court in the case of Harriman vs. Northern Securities Company, 197 U. S. 293-4, and is sustained by numerous authorities, including the following:

Oakland Sugar Mills Co. v. Fred W. Wolf Co. (CCA), 118 Fed. 248.
Smith v. Boston Elev. Ry. Co., 184 Fed. 389.
Davis and Rankin Bldg. & Mfg. Co. v. Dix, 64 Fed. 406, 410, 411.
Lorane Mfg. Co. v. Oshinsky, 182 Fed. 407.
Southern Cotton Oil Co. v. Shelton, 220 Fed. 256.

The Land Company assumed the position its entire complaint was because it could not build in excess of 60 feet. The Railroad Company accepted that as the true position of the Land Company, and met it on that assumption, and under the authorities cited, after the Railroad Company had met it on that ground, the Land Company was estopped from thereafter mending its hold and taking the position that it could not construct even

to 60 feet, especially in view of the fact that it is physically possible to build a dam 60 feet without interference and in view of the fact that that was the definite understanding and agreement between the Interior Development Company and the Railroad Company, it being understood in such agreement that proper provision would be made in the dam to take care of the flood-water.

We submit, therefore, that the Court should hold either that the line as constructed fully complies with the agreement of the parties and their predecessors in interest, or that the Land Company is estopped to deny that the same is so constructed.

V.

The compensation allowed by the lower court is ample to cover any damage sustained by the Land Company by virtue of the construction of the line in its present location.

The lower Court, in view of the conflict of the testimony as to the agreement, refused to find any such agreement but assessed $1000 as damages and gave the railroad its right of way over the property under the principle laid down by the United States Supreme Court in City of New York vs. Pine, 185 U. S. 93, Andrus vs. Power Co., 147 Fed. 76, and other cases.

In assessing the damages, the same were and should be assessed, of course, as if no contract or agreement were entered into. The entire testimony as to damage offered by the Land Company was

with reference to curtailment of power development. There has been no curtailment of the power development of the property. The Land Company's property permits the raising of the water, as we have pointed out, only to a height of 28 feet at the dam site. It has ample room to develop to this height. The line is 64.67 feet above low water at this point. It cannot build so as to flood the line because the railroad has acquired definite rights over the property formerly held by the Interior Development Company. One of these tracts is right at the dam site, the other a short distance above. Besides the Railroad Company has land immediately above that held by the Land Company which it acquired from the Government and from private owners (Stip. par. 6, 7, Trans. p. 159, par. 15, p. 164), which the Land Company cannot flood. In determining the Land Company's damages, the Court cannot take into consideration the power possibilities of the property as if it owned the land further up the river, but it can take into consideration only the lands and flowage rights it actually owns.

In the case of Grays Harbor Boom Company vs. Lounsdale, 54 Wash., page 21, the Court had before it a condemnation case in which the defendant was seeking to enhance its damages by showing a value for certain purposes for which the property was not available except in connection with land already acquired by the condemning company. The Court, in regard to the right of such land owner to have

taken into consideration elements not owned, for the purpose of increasing the damages for the property taken or impaired, says:

> "If this were not true, as a matter of law, the testimony upon this feature of the case is too vague and uncertain to warrant a verdict. It is not shown that the use of respondent's land for a sawmill is contemplated or even probable within any reasonable time, *or that it could be so used independently of lands occupied by petitioner.* The contemplated use in proper cases must *not only be available* but valuable. In this connection, an available use means a possible use, not a use contingent upon the abandonment of the use of adjoining property engaged by another in the public service of the state, or upon conditions remote, uncertain, and speculative."

In the present case the Land Company is trying to have considered as an element of its damage, a use which is not available because it contemplates the use of property above that owned by the Land Company, which is in the possession of the Railroad Company and already devoted to other public service. Therefore such element under the cases cited cannot be considered.

The United States Supreme Court has taken a similar view of this situation. In Boston Chamber of Commerce vs. Boston, 217 U. S. 194, the defend-

ant was the owner of the property in question on which there was an outstanding easement and the land owner was attempting to have considered for the purpose of enhancing the value of the property taken, the rights of both the defendant and of the owner of dominant servitude. The Court says:

> "The only question to be considered is whether when a man's land is taken he is entitled by the 14th amendment to recover *more than the value of it as it stood at the time.* For it is to be observed that the petitioners did not merely contend that they were entitled to have the jury consider the chance of getting a release, for whatever it might add to the market value of the land, as the city merely contended that the jury should consider the chance of not getting one. The petitioners contended that they had a right, as a matter of law, under the Constitution, after the taking was complete and all rights were affixed, to obtain the connivance or concurrence of the dominant owner, and by means of that to enlarge a recovery that otherwise would be limited to a relatively small sum. It might be perfectly clear that the dominant owner never would have released short of a purchase of the dominant estate—in other words, that the servitude must have been maintained in the interest of lands not before the Court—but still, according to the contention, by a simple joinder of parties after the taking,

the city could be made to pay for a loss of theoretical creation, suffered by no one in fact.

"The statement of the contention seems to us to be enough. It is true that the mere mode of occupation does not necessarily limit the right of an owner's recovery. Boom Co. vs. Patterson, 98 U. S. 403, 408. Louisville & Nashville R. R. Co. vs. Barber Asphalt Co., 197 U. S. 430-435. But the Constitution does not require a disregard of the mode of ownership—of the state of the title. It does not require a parcel of land to be valued as an unencumbered whole when it is not held as an unencumbered whole. It merely requires that an owner of property taken should be paid for what is taken from him. It deals with persons, not with tracts of land. And the question is what has the owner lost, not what has the taker gained. We regard it as entirely plain that the petitioners were not entitled as a matter of law to have the damages estimated as if the land was the sole property of one owner, and therefore are not entitled to $60,000 under their agreement."

Again in McGovern vs. United States, 229 U. S. 372, the United States Supreme Court says:

"The enhanced value of the land as part of the Ashokan reservoir depends on the whole land necessary being devoted to that use. There are said to have been hundreds of titles to different parcels of that land. If the parcels were

not brought together by a taking under eminent domain, the chance of their being united by agreement or purchase in such a way as to be available well might be regarded as too remote and speculative to have any legitimate effect upon the valuation. See Chicago, Burlnigton & Quincy R. R. Co. vs. Chicago, 166 U. S. 226, 249. The plaintiff in error was entitled to be paid only for what was taken from him as the titles stood, and could not add to the value by the hypothetical possibility of a change unless that possibility was considerable enough to be a practical consideration and actually to influence prices. Boston Chamber of Commerce vs. Boston, 217 U. S. 189, 195. In estimating that probability the power of effecting the change by eminent domain must be left out. The principle is illustrated in an extreme form by the disallowance of the strategic value for improvements of the island in St. Mary's River in United States vs. Chandler-Dunbar Water Power Co.., ante p. 53. The plaintiff in error relies upon cases like Mississippi, etc., Boom Co. vs. Patterson, 98 U. S. 403, to sustain his position that while the valuation cannot be increased by the fact that his land has been taken for a water supply, still it can by the fact that the land is valuable for that purpose. The difficulties in the way of such evidence and the wide discretion allowed by the trial court are well brought

out in Sargent vs. Merrimac, 196 Massachusetts 171. Much depends on the circumstances of the particular case."

The Court cannot award damages to the plaintiff for a property right not owned by it and which is a matter of speculation as to whether or not the Land Company will or can ever acquire. As stated by the books, the condition of the Land Company acquiring the necessary property above that now owned by it, in order to round out its right to construct in excess of 28 feet, is too speculative and remote to be considered in determining the damages of the Land Company. That property cannot even be acquired by the Land Company by eminent domain because it is already devoted to public use. To permit such property to be taken into consideration would be to require the Railroad Company to pay to the Land Company for property which the Railroad Company now already owns.

There was no proof offered by the Land Company as to the value of the land except that it was of little worth except for power development. The power development of the property owned by the Land Company is not interfered with. The Court treated the $1000 agreed upon between the Railroad Company and the Sherar heirs as adequate compensation under the evidence, in the absence of any evidence to the contrary.

Mr. Martin (Trans. p. 190) testified that his company had sold one forty-acre tract which it

had acquired with the other property there and which had nothing to do with the hydro-electric development, for the sum of $200. This was undoubtedly the fair market value of the land itself. At the same rate the one thousand dollars allowed by the Court would represent the value of two hundred acres. Two hundred acres would give a right of way 200 feet wide and over 8 1-3 miles long. The right of way in this case over all of the property, including that held by the Interior Development Company and that acquired from the Government, would not exceed 3½ miles in length. Measured by the standard, therefore, of the Land Company's own sales in this immediate vicinity, the Land Company has been adequately compensated.

The Land Company asserts that the question of damage cannot be resolved upon this record and is seemingly dissatisfied with the testimony which it put in, and is now seemingly seeking to have this Court reconsider the question of damages. The Court will note from the record that the main contention and effort of the Land Company in this case on the trial was directed to proving the extent of its damages. It had practically abandoned the idea of removing the Railroad Company from the land and directed its attention to securing as heavy damages as possible. The Railroad Company objected to the Court going into the question of damages at all until the question of the rights of

the parties in the various lands had been determined, and all of the testimony of the Land Company on the question of such damage was introduced over the objection of the Railroad Company. In this connection, Mr. Walter S. Martin, as one of the Land Company's witnesses, was asked the following question (Trans. 189-190):

"Q. What total amount did your company expend in the acquisition of these lands?

A. Up to this time?

Q. Yes.

Mr. Wilson: I think that is immaterial.

The Court: Let him answer the question.

Mr. Veazie: I think, your Honor, the price paid for the land is always evidence affecting their value.

The Court: I think probably it is competent here, for this is not an action to condemn this property, and it may be necessary to ascertain the damages ultimately and include it for that purpose. You may answer the question, Mr. Martin."

And again, on page 193, the witness was asked:

"Q. State whether or not those lands also had availability owing to their location for railroad construction purposes, at the time you bought them—whether any railroad that might seek a water grade from the Columbia River to the Interior of Oregon would be likely to need this land for that purpose.

Mr. Wilson: I object to that. They are claim-

ing here that practically the sole injury in this case is the interference with their right to construct a power plant.

The Court: You can take the testimony and Mr. Wilson will save an exception."

Again, when Mr. Welch was on the stand (Trans. 234) he was asked the question:

"Q. I would ask you now to state to the best of your ability the market value of these lands, in view of all the capabilities they have for different uses?

Mr. Wilson: I object to that, your Honor, as immaterial and irrelevant to this controversy at this time.

The Court: He can answer the question."

Similar objections were made when the witness Thompson was attempting to testify to the value of the loss in power by reason of curtailment of the height of the dam, and the testimony was admitted. (Trans. 239-240.)

Again on pages 250 and 252 further objection was made. Witness Stillman, Trans. pp. 275 and 282, and witness Kyle, Trans. 299.

Notwithstanding these objections and the contention of the Railroad Company that the same was improper to be considered at the present hearing, the Court permitted the testimony to be taken and it was all taken for the very purpose of assessing the damages, and the Land Company cannot now be

heard to object to the same. If anyone had the right to so object it was the Railroad Company, who voiced its objection throughout the trial and not the Land Company.

Further contention is made that with reference to the damages, the Railroad Company has the burden of proof. We disagree as to this. The Land Company was the plaintiff. It alleged that its property was of great value and being damaged, and the damages were assessed under the decisions which hold to the effect that when a land owner stands by and permits a line to be constructed over his property, he is precluded from removing the line and is restricted to his action for damages, and in view of this restriction, the courts permitted the damages to be assessed in the injunction suit to prevent a multiplicity of actions. In an action for damages, therefore, under the circumstances, the burden of proof would be upon the plaintiff and we know of no reason why that burden should shift. The Land Company, under the burden of proof has failed to sustain the same, and we do not know of any reason why it should now be permitted to amend its position or retry the question because it is dissatisfied with the amount awarded.

"The general rule is that whoever has the affirmative of the issue as determined by the pleadings, and where there are no pleadings, by the nature of the investigation, has the burden of proof. It never shifts from that party either in civil or in

criminal cases. Where a party erroneously assumes the burden of the proof as to any particular allegation or the burden of evidence as to a particular fact, the mistake will not be corrected in the Appellate Court."

16 Cyc. 926.

In condemnation proceedings it is stated:

"The burden of showing necessity for public use is upon the petitioner. The burden of showing damages which the owner will suffer rests upon him."

15 Cyc. 898.
2 Lewis on Em. Dom. 3 Ed., Sec. 645.
Tanner v. Canal Co., (Utah) 121 Pac. 589.
Water Co. v. Frederick, 110 Pac. 137.
See also numerous cases cited in Cyc. and Lewis.

With reference to the contention that the issue of damages was raised first by the answer, we call attention to the allegations of paragraph 18 of the second amended complaint, particularly that contained on pages 38 and 39 of the Transcript, in which the Land Company attempts to set out at considerable length its damages and what they consist of. It is true that the answer requests the Court to determine the amount of damages in case it should hold that the defendant were not entitled to a dismissal of the suit, but the plaintiff alleges

its damages, assumed the burden of proof thereon from the start, it had the affirmative of the issue to establish said damages, and it would be contrary to reason to say that the Railroad Company had the burden of establishing the extent of the damage. The plaintiff having assumed the burden and failing to sustain the same, it certainly cannot now complain that the Court improperly assessed the damages because the *defendant* failed to prove that the damages were more than one thousand dollars.

VI.

The claim for damages in this case, if any exist, belongs to the predecessor in interest of the Land Company, rather than to the Land Company.

It is a well settled principle of law that where a railroad company unlawfully enters upon and constructs its line over the land of another, that the claim for damages on account of such unlawful entry is personal to the land owner at the time of the alleged unlawful entry, and does not run with the land, and any subsequent vendee of the owner of the land at the time of entry, takes the same subject to the burden of the railroad, such damages being in the nature of compensation for trespass, constituting a personal claim in favor of the owner at the time the entry occurred.

Roberts v. N. P. Ry. Co., 158 U. S. 1, 11.
Kindred v. U. P. R. R., 225 U. S. 582, 597.

Kakeldy v. Cal., etc., Ry. Co., 37 Wash. 675, 680.

Stone v. Waukegan, 205 Fed. 498.

At the time of the entry of the Railroad Company upon the land, the title to the same was held by the predecessors in interest of the Land Company. As far as the property is concerned, title to which was in the Interior Development Company, to-wit: Lot 1 of Section 3, Tp. 4 S. R. 14 E., and the Northeast Quarter of Southeast Quarter of Section 9, same township and range, there can be absolutely no doubt that the Land Company accepted title subject to the burden of the railroad thereover. The NE¼ of SE¼ of Sec. 9 was not transferred by the Interior Development Company to the Land Company until August 2, 1910, and Lot 1 of Section 3 was not transferred until April 4, 1914. At the time of entry of the railroad upon the land in question, the Interior Development Company was the absolute owner of this property, and under the principle of the cases just cited, there can be no doubt that the Land Company took title to this property subject to the burden of the railroad, which was constructed long prior to the transfer of the title to the Land Company.

It is claimed by the Land Company, however, that this principle cannot apply to the property acquired from the Sherar heirs, because of the outstanding option from the Sherar heirs held by Laughlin, and claimed to have been acquired by the

Land Company on August 5, 1909. The right of action for damages being personal to the land owner, it would have to be transferred in order to pass, irrespective of any outstanding option, and there was no proof in this case of any such assignment. Furthermore, the Land Company had not paid any money for the option on account of the purchase of the property until long after the entry of the railroad upon the land. In this regard, Mr. Martin, president of the Land Company testified (Trans. p. 203):

"Q. And did you take up with Mr. Morrow or anyone connected with the Des Chutes Railroad Company the fact that you were contemplating the purchase, and you didn't want them to treat with the Sherars?

A. I had bought the thing in August.

Q. In August, 1909. You hadn't paid any money at that time?

A. No, but we were under an obligation.

Q. What date in August?

A. Well, one contract was on the 5th, and the other contract on the 6th.

Q. You say they telephoned you that they were considering a right of way or the Des Chutes people wanted a right of way?

A. No, I don't know that it was the Des Chutes people.

Q. Well, that someone wanted a right of way?

A. One of the railroads had communicated with one of these representatives of this property, either

the Sherar interests of Laughlin or Simmons; it was communicated to me, I think, in San Francisco—I am not sure if it was here. What I said in reply to the thing was that if they do anything in regard to the right of way which damages the power value of that property, they do so at their own peril, and if they damage that property from the point of view of its power possibilities, we will feel free to retire from our contract.

Q. Now, Mr. Martin, the railroad was practically constructed there before you paid any money in December, 1909, was it not?

A. Oh, the railroad was doing all kinds of things there.

Q. I mean it had men on the work and the grade was practically completed at that time across the Sherar property?

A. Well, I don't suppose that I was bound to assume that a perfectly illegal and violation proposition of that sort was binding on me."

Mr. Martin by his testimony here shows that he conceived perfectly his legal rights in case anything was done by the owners of the land which he considered interfered with the power development. That is, he notified the owners that if anything was so done, he would feel free to cancel and retire from the purchase. He had not parted with one dollar in money, and the Sherars were still owners of the legal title. There was no obligation on Mr. Martin's part or that of the Eastern Oregon Land Com-

pany to go on with the purchase. It was in fact a simple option on which the Land Company had paid not one dollar. Mr. Martin's remedy was against the land owner, as he perfectly well knew, as shown by his testimony.

Under the authorities the right of action for damages against the Railroad Company, if any, existed in favor of the Sherar heirs and not in favor of the Land Company, and no assignment of such claim was shown nor did it in fact exist. However, the Railroad Company had agreed to pay the Sherar heirs one thousand dollars for the property, and it pleaded that it was ready, willing, and able to pay the same, and is willing to stand by what it supposed was its agreement in that regard, and while, as a matter of law, we submit that the Land Company has not the right to recover damages for the entry on the land, the Railroad Company is willing to and has paid that amount into court for the right of way in question, but the same was not demandable by the Land Company by legal right.

VII.

The Railroad Company has a right of way two hundred feet in width over the property, title to which was in the Government at the time of entry of the railroad thereon.

In the foregoing part of this brief we have discussed the rights of the parties on the assumption that the Sherar heirs were the owners of the N½ of SW¼ of Sec. 35, Tp. 3 S. R. 14 E., and Lot 2

of Sec. 3, Tp. 4 S. R. 14 E., and if the Court shall hold that said title having subsequently been acquired by the Land Company, related back so as to make the Land Company's rights prior to the Railroad Company's, then the decree should grant the right of way over this property as well as the balance of that held by the Land Company, as the sum paid is adequate to cover the same and should cover whatever rights the Land Company has in any of the property at this point.

However, we submit, that the Railroad Company's title over the two tracts in question, as acquired from the Government, is good as against the Land Company and should be prior thereto. The lower Court decreed that the Railroad Company was the owner of a right of way two hundred feet in width over and across this property, superior to any title in the Land Company. (Decree, Trans. p. 126.)

On the 27th day of January, 1906, this land was vacant public land of the United States, and on such date A. L. Veazie, on behalf of the Interior Development Company, filed a lieu selection thereon. (Stipulation, paragraph 8, Trans. 160.) Two weeks later, to-wit, on February 13, 1906, Joseph H. Sherar filed a contest of the Veazie selection and also filed an application to select this land himself. (Stipulation, paragraph 9, Trans. 160-1.) This contest was originally decided in favor of the Veazie selection, but later, on June 16, 1909 (Stipulation, paragraph 10, Trans. 161), was reversed. Prior to

the decision of this contest, however, these lands were all withdrawn from any form of disposition for irrigation works under the Act of June 17, 1902. (Stipulation, paragraph 12, Trans. 162.) This withdrawal was an absolute withdrawal against all forms of disposition. U. S. vs. Hansen (CCA 9th Circuit), 167 Fed. 881.

On November 5, 1908, the Board of Directors of the Railroad Company adopted its line of definite location over these lands, and on November 8th filed its profile thereover with the Register of the United States Land Office at The Dalles, Oregon, said company having previously, on February 9, 1906, filed certified copies of its articles of incorporation and due proofs of its organization under same with the Secretary of the Interior.

This profile was approved by the Secretary of Interior on June 10, 1910. (Stip., paragraphs 3, 4, 5, Trans. 157-8.) The withdrawals by the Secretary of the Interior from disposal of said lands were not cancelled until the 25th day of February, 1913, at which time patents to the said lands were issued on the Sherar lieu selection, but appended to said patents when issued was the following indorsement: "The lands above described are subject to all rights under an application by the Oregon Trunk Line, Inc., approved June 21, 1909, and an application by the Des Chutes Railroad Company, No. 01603, The Dalles, approved June 20, 1910, under the Act of March 3, 1875, being

applications for rights of way." (Stip., paragraphs 10 and 11, Trans. 161-2.)

It is now claimed by the Land Company that the decision of the lower Court in awarding the Railroad Company a right of way over these lands was based upon the decision of the Circuit Court, affirmed by this Court in the case of Daniels vs. Wagner, 205 Fed. 235, and that as said case has since been reversed by the United States Supreme Court, 237 U. S. 547, that part of the decree in this case should be reversed.

We submit, however, that such result does not follow, but that the present case is distinguishable from the Daniels case. In the Daniels case there was no withdrawal of lands from disposition but an arbitrary selection of one entryman over another, and the Court held that such arbitrary selection by one entryman over another was not permissible by the executive authority. In the present case the United States withdrew the lands from any form of disposal for irrigation works under the Act of June 17, 1902. This act provides, with reference to withdrawals of lands, as follows:

> "Section 3. That the Secretary of the Interior shall, before giving public notice provided for in Section 4 of this act, withdraw from public entry the lands required for any irrigation works contemplated under the provisions of this act, and shall restore to public entry any of the lands so withdrawn when in

his judgment such lands are not required for the purpose of this act."

7 Fed. Stat. Anno. 1099.

The act also provides for withdrawal except by homestead entry lands susceptible of irrigation.

This Court, in the case of U. S. vs. Hansen, 167 Fed. 885, interpreted this provision of the law as follows:

"Prior to the date of the reclamation act, the defendant in error had settled upon the land in controversy, intending to make a homestead entry thereon whenever it should be surveyed or offered for settlement. It has never been surveyed or offered for settlement and the question arises whether or not he had acquired such right thereto that it may not be withdrawn under Section 3. That section makes provision for two distinct classses of reservation of public lands for two distinct purposes. It provides, first, that the Secretary may withdraw from public entry such lands as are required for the actual occupation of the reclamation service. This is for such purposes as reservoirs, canals, pumping works, etc. No exception whatsoever is expressed as to lands which are authorized to be withdrawn for these purposes. It provides, second, for the withdrawal of any other public lands 'believed to be susceptible of irrigation from said works.'

> Such lands are to be withdrawn from entry 'except under a homestead law.' "

The withdrawal in this case was the absolute withdrawal for irrigation works. The withdrawal was made for the purpose of enabling the United States itself to construct irrigation works and not for the benefit of any other person. The Act of 1902, under which said withdrawals were made, was in effect at the time the selections were made by the Sherars and such selections were made subject to rights of the United States to withdraw at any time it determined to exercise its right of withdrawal. By the filing of lieu selections Sherars acquired no vested interest in the lands as against the United States,

> Cosmos Exploration Co. vs. Gray Eagle Oil Co., 190 U. S. 301, 311.

And by such withdrawals all proceedings to select the land were at an end.

In the case of Frisbie vs. Whitney, 9 Wallace 187, it is held in the case of a pre-emptioner that occupation and improvement of public lands under pre-emption laws created no vested right in the occupant as against the United States, and that until a complete equitable title is acquired, it is within the legal and constitutional competence of Congress to withdraw the land from entry and sale although this may defeat the imperfect right of the settler.

In the Yosemite Valley case, 15 Wallace 93, the United States Supreme Court again affirmed the decision in the Frisbie vs. Whitney case, and held that the Government had the right to withdraw these lands from sale and grant them to the State of California for park purposes, and that such pre-emption settler had no vested interest in the property which the Government was bound to recognize.

Similar holding was again made by the Supreme Court of the United States in the case of

Campbell v. Wade, 132 U. S. 34.

This latter case was one in which the State of Texas had passed an act for the sale of a portion of the vacant and unappropriated public lands within that state. The petitioner made application for a right to purchase under the state law. He had complied with the provisions of the law as far as it was possible for him to comply. Before, however, the survey was made, the state passed an act withdrawing from sale all the public lands in question and the Supreme Court held that the applicant had no vested right under his application to purchase as against the state, and such withdrawal could be made irrespective of such application. So this Court had held with reference to the reclamation act, the identical act under which the withdrawals were made in the present case, in the case of United States vs. Hansen, 167 Fed. 881. There-

fore, when the Government withdrew the lands from entry and sale, as stated by the Supreme Court, it "put an end to proceedings instituted for their acquisition."

Campbell v. Wade, 132 U. S. 37.

After these withdrawals the lands stood as if no application to purchase had been made. These withdrawals remained in effect for seven years as to one of the tracts and for five years as to the other. During this period the Government approved the map of location of the Railroad Company, which it had a right to do, under the Act of Congress approved March 3, 1899, 30 Stat. 1233, where it is provided:

> "That in the form provided by existing law the Secretary of the Interior may file and approve surveys and plats of any right of way for a wagon road, railroad, or other highway, over and across any forest reservation or reservoir site, when in his judgment the public interests will not be injuriously affected thereby."

This was a reservoir site and the Government determined that the height of the line was sufficient to protect its interests and the public interests and the public interests would not be injuriously affected thereby, and approved the map as it had authority to do under this act of Congress, and the effect thereof was to grant the Railroad Company the right of way.

Three years later, when the Government determined that it would not need these lands for its reclamation project, it cancelled the withdrawals and patented the lands to the Sherar heirs. In issuing the patent, however, it issued the same with the endorsement that the same was subject to the right of way of the Des Chutes Railroad Company, under the approval of its map June 20, 1910. Under such circumstances, therefore, we submit that the withdrawal of the lands from entry and sale cancelled the applications to purchase, and the approval of the map of the Railroad Company during the time of such withdrawal was under authority of law and granted to the Railroad Company the right of way two hundred feet in width.

VIII.

The court erred in granting the costs of this proceeding to the Land Company and against the Railroad Company.

On the main part of this brief, the Land Company was the appellant. Upon being served with the appeal of the Land Company the Railroad Company filed a cross appeal, appealing from that portion of the decree which adjudged that the Land Company was entitled to recover its costs against the Railroad Company.

As specification of error the Railroad Company asserts:

1. That the United States District Court for

the District of Oregon erred in adjudging and decreeing that the complainant have and recover of defendant costs and disbursements incurred by the complainant in said cause.

2. That the said Court erred in not adjudging and decreeing that the defendant have and recover from the complainant the costs and disbursements incurred by said defendant in said cause.

3. That the Court erred in treating said action as a condemnation suit and in holding and deciding that inasmuch as defendant made no tender to cover the damages prior to the commencement of the suit, complainant was entitled to recover its costs and disbursements under Section 6868 L. O. L.

4. That the said Court erred in decreeing and adjudging costs to complainant and against defendant as a matter of law under and by virtue of Section 6868 L. O. L.

5. That it was an abuse of discretion on the part of the Court to decree and adjudge costs in this case in favor of complainant and against defendant in that this was a suit for an injunction to restrain the defendant from operating its railroad over said lands claimed to be owned by complainant. That as to all but a small portion of said lands, said title was disputed by defendant and the title claimed by the defendant, and that as to all of the lands, title to which was disputed, the decision of the Court was in favor of the defendant

and against the complainant, and that it was an abuse of the Court's discretion to decree costs to the complainant and against the defendant as to all of the lands, title to which the Court found to be in the defendant.

The opinion of the Court with reference to costs is short and is as follows: "Fourth: That as defendant made no tender to cover the damages prior to the commencement of the suit, complainant should have judgment for its costs and disbursements. (Section 6868, Lord's Oregon Laws, 1; 15 Cyc. 1015.)"

Section 6868, Lord's Oregon Laws, is one of the provisions of the code with reference to the condemnation of land. It provides: "The costs and disbursements of the defendant shall be taxed by the clerk and recovered off the corporation, but if it appear that such corporation tendered the defendant before commencing the action an amount equal to or greater than that assessed by the jury in such case, the corporation shall recover its costs and disbursements off the defendant." It will be seen, therefore, that the Court treated this as a condemnation case and granted the costs to the Land Company on such a basis, and as a matter of right.

The Court was in error, we submit, in this, as this was not a condemnation case, but was a suit for an injunction to remove the Railroad Company from the land. As to this relief sought, the decision was against the Land Company and in favor of the Rail-

road Company. Furthermore, as to that land acquired from the Interior Development Company, and that part title to which was in the Government at the time of the commencement of this action, the decision was in favor of the Railroad Company and against the Land Company. Certainly as to these tracts of land the costs should not be recovered by the Land Company, but the Railroad Company should have recovered costs. Furthermore, as to the balance of this land, title to which was acknowledged to be in the Land Company, the Railroad Company in its first pleading offered to pay to the Land Company the sum of $1,000. It was pleaded that it had an agreement to pay such sum to the Land Company, and was ready, willing and able to pay the said amount. The Land Company refused to accept this, and certainly any costs incurred after the refusal of the Land Company to accept this amount, such costs should not be recovered against the Railroad Company.

As above stated, this was not an action to condemn the property, but a suit for an injunction, and in such cases, where the railroad company has gone on the land with the acquiescence of the land owner, the said land owner is precluded from removing the railroad company, and is relegated, under the authorities, to an action for damages.

Instead of requiring the land owner to institute a separate action for damages, the Court permits the damages to be assessed in the same proceedings. (Andrus v. Power Co., 147 Fed. 76.) This proce-

dure does not partake of the circumstances contemplated in Section 6868, where the railroad company institutes a proceeding and has the opportunity to make a tender prior to commencing the condemnation proceeding.

In this case, however, the land owner, after the Railroad Company had considered everything settled, and without any warning to the Railroad Company, commenced a proceeding. Under such circumstances the Railroad Company had no opportunity to make a tender prior to the commencement of the proceeding. It should therefore not be mulcted in costs by the Court, under the statute in question.

The court of equity has a judicial discretion with reference to the allowance of costs.

Trustees v. Greenough, 105 U. S. 527.
In re. Mich. Central R. R. Co., 124 Fed. 731.

The court of equity ordinarily follows the law in the matter of costs, and certainly, as to that part of the case in which the Court held the title of the Railroad Company superior to that of the Land Company, no costs should be allowed the Land Company, but should be allowed to the Railroad Company, and as to the balance of the lands, the Railroad Company having offered to pay the sum of $1,000, and the testimony showing that the Land Company knew that said sum had been offered at all times, it should not be permitted to refuse to accept said sum and then require the Railroad Company to pay the costs of this proceeding.

We submit that the Court erred in giving the costs to the Land Company as a matter of right under the statutes of Oregon with reference to condemnation proceedings.

References to Plaintiff's Brief

At the time of the preparation of the foregoing brief, we had only been furnished with typewritten notes of the plaintiff's brief. We have now received copies of the plaintiff's brief and desire to call attention to one or two things.

1. The map inserted between pages 2 and 3 of the brief was not an exhibit in the case and does not accurately show the location of the river. The same is more accurately shown on Defendant's Exhibit C, and it is in evidence that the proposed dam would have to be attached to Lot 1 of Sec. 3, Tp. 4 S. R. 14 E., which was at the time of the entry the property of the Interior Development Company.

2. On page 2 of complainant's brief, the statement is made with reference to the lands, title to which was in the United States at the time of the commencement of this action, that under the opinion of the First Assistant Secretary of the Interior in a contest between Sherar and the Interior Development Company before the Land Department, it was shown that the property had been in the *bona fide* occupancy of Sherar from 1871. The opinion of the First Assistant Secretary was not

substantive evidence in this case of the facts stated in said opinion. The defendant in this case was not a party to that proceeding, and at the time the opinion was introduced as evidence, it was objected to. (Stipulation paragraph 10, Trans. 161.) The Des Chutes Railroad Company was not a party to that contest and the opinion is not substantive evidence of the facts referred to. As a matter of fact, the land could not lawfully have been in the *bona fide* possession of Sherar from the year 1871 because he had taken up a homestead and had exhausted his right in that regard, and it is not claimed that he had ever made any entry or taken any proceedings to legally acquire the same. Furthermore, this contention was abandoned by the complainant because it stipulates that on the 27th day of January, 1906, the north half of the southwest quarter of section 35, township 3 S. R. 14 E. W. M., and lot 2 and the southeast quarter of the northwest quarter of section 3, township 4 S. R. 14 E. W. M., were *vacant* public lands of the United States. (Stip. paragraph 8, Trans. 160.)

3. On page 4 the statement that on August 5, 1909, the Eastern Oregon Land Company acquired from Laughlin the option on the Sherar property, paying therefor $23,000 cash and undertaking to pay the further sum of $27,000, is certainly misleading. While it is true the assignment of the option was made on August 5, 1909, no money whatever was transferred then nor was any money whatever paid by the Land Company until after

the first of December. (Testimony of Martin, Trans. 184, 203, 204.)

4. The further statement on the same page that in December of the same year it acquired the adjacent property of the Interior Development Company for $20,000, is likewise misleading. The Land Company did not acquire the properties of the Interior Development Company at that time, but acquired the stock of the Interior Development Company. The property still remained in the Interior Development Company until long after, the forty acre tract in section 9 being transferred on August 2, 1910, and the piece right at the dam site was not transferred until April 4, 1914 (Stipulation paragraph 19, Trans. 171), about one week prior to the trial of this case.

5. On page 5 the statement is attributed to Mr. Kyle that the value of the land in question had been depreciated $75,000 by the construction of defendant's railroad. This statement, however, was made by Mr. Kyle on the assumption that the Land Company had full right to construct as high as it desired. This testimony should be taken in connection with his cross-examination where he testifies as follows:

"Q. But if it should develop that the Sherar estate hasn't the right to the dam site, what difference would it make in your estimate?

A. Well, if they have no right to build there, it would not be of much value. *My estimate is based*

upon the fact that the Eastern Oregon Land Company had complete right to construct. I assume that they can condemn the property. They would have to pay whatever it cost to get the property.

Q. Now, if it should also develop that they have no rights up the river, south of the south line of the NE¼ of SE¼ of Sec. 9, Tp. 4 S. R. 14 E., and could not acquire any, do you consider that their property was made less valuable by reason of the present location of the DesChutes Railroad Company than if it were four and one-half feet higher?

A. If it is a fact that they have no right to acquire the property or condemn it, it would not.

Q. If the complainant in this case has no rights south of the south line of the NE¼ of SE¼ of Sec. 9, Tp. 4 S. R. 14 E., and can acquire no rights there above that point, how much less valuable is that property of the Sherars for power purposes at the present location of the DesChutes Railroad Company than if their line were four and one-half feet higher?

A. If it is a fact that they have no rights and can acquire no rights up there, it would not affect it."

(Trans. pages 303 and 304.)

6. On page 15 it is stated that the ties and rails were not laid until October 10, and there was no railroad in evidence on the land at the time this suit was commenced or at any time prior to October 10th. The inference from this is that the rail-

road had not been constructed within the contemplation of the law prior to the commencement of this suit. The damage, however, under the authorities cited in our main brief, takes effect as of the date of the entry. Moreover, the grading was practically completed. The ties and rails were not laid nor the bridges constructed. This, however, within the contemplation of the law, is the construction of the line for the purpose of determining adverse rights.

Johnson v. Spokane International Railway Co., 137 Pac. 894.
N. P. v. Borlaw, 143 N. W. 903.

7. The statement on page 18 that Owre, the engineer in charge of the construction, declared in December, 1909, that it was not apparent at the dam site where the grade would be located, is misleading. What he says is that right opposite the dam site he didn't think it was apparent, but 500 feet above and extending for a distance of perhaps eleven or twelve hundred feet the grade was practically completed. However, Mr. Boschke, testifying with the progress profile before him, which showed the progress of the work, testified:

"Q. How soon was it, Mr. Boschke, that an examination of the grounds would disclose the grade at which the line was to be constructed?

A. Well, the grading at Mile Post 44, 1000 feet in there, was about completed in August, 1909, and

right at the dam site the grade was completed—well, I don't say was completed, but it was laid out there so you could see where the grade was in October and November, 1909. That was right practically at the dam site; either side of that; in fact, the grade all along there was marked out so you could readily see at what height the grade would be." (Trans. p. 332.)

Mr. Brandon, the engineer in charge, testified:

"By the end of September, 1909, I should say the grade of the line was pretty well defined in places on the ground so that anyone in the vicinity could ascertain approximately where the line was to be, or the elevation where the line was to be constructed." (Trans. p. 419.)

8. On page 39 it is asserted that the Railroad Company could acquire no right of way over lands reserved under the Act of March 30, 1875. The complainant, however, overlooks the Act of Congress approved March 3, 1899, 12 Stat. 1233, which provides:

"That in the form provided by existing law, the Secretary of the Interior may file and approve surveys and plats of any rights of way for any wagon road, railroad, or other highway, over and across any forest reservation or reservoir site when in his judgment the public interests will not be injuriously affected thereby."

9. From pages 42 to 52 complainant seeks to

avoid the burden cast upon it by the negotiations between the Railroad Company and Laughlin, and on page 52 it is stated that the defendant took no steps in execution of the agreement until after it knew the plaintiff had acquired Laughlin's interests.

The complainant is mistaken in this because immediately after the interview between Laughlin and the railroad officials, the survey was re-run. A re-survey of the line on the side of the canyon for a distance of approximately seven miles requires the expenditure of considerable money. This was made in direct compliance with the interview between Laughlin and the railroad officials, and the assertion that the Railroad Company took no step in the execution of the agreement until after it knew that the plaintiff had acquired Laughlin's interest, is erroneous. The survey was completed long before the Land Company acquired the option, which was in August, 1909.

10. On page 60 of the brief it is stated that it is apparent in view of this testimony, and there is no other testimony in the record relating to any transaction between the railroad and Sherar's executors, the Railroad Company has not sustained its case. It is apparent here, and throughout the entire brief of complainant, that it is going on the assumption that the Railroad Company in this case has the burden of proof throughout, whereas the Land Company was the plaintiff and, of course,

should be required to sustain its case rather than the Railroad Company.

The foregoing are only a few of the points on which complainant draws a distorted meaning from an isolated expression of a witness without taking into consideration all of the testimony on any particular point.

We therefore submit, with reference to this case, that the decision of the lower Court should in all respects be affirmed with the exception of its allowance of costs, and that said part of the decree should be reversed and the Railroad Company be granted its costs against the Land Company, or, if for any cause the Court should consider this improper, then the same should be apportioned so as to grant to the Railroad Company its costs with reference to that part of the case in which the title of the Railroad Company was held superior and no condemnation necessary.

Respectfully submitted,

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